

Decision Notice

Decision 176/2015: Mrs W and East Dunbartonshire Council

Legal correspondence

Reference No: 201500417

Decision Date: 12 November 2015



Scottish Information
Commissioner

Summary

On 3 March 2014, Mrs W asked East Dunbartonshire Council (the Council) for correspondence between the Council and its external legal advisers in connection with the planning applications for a specific development.

The Council withheld the information under the EIRs, as it considered it to be covered by legal professional privilege. Following an investigation, the Commissioner accepted this.

Although the Commissioner upheld the Council's actions in relation to the outcome of the application and compliance with the EIRs, she has set out, apart from her decision, her observations about the Council's handling of the initial request.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation – 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 Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 3 March 2014, Mrs W made a request for information to the Council. The information requested was:
“... all the correspondence between the Council and Shepherd and Wedderburn during 2012, 2013 – and now 2014 – in relation to planning applications TP/ED/04/1279, TP/ED/12/0530 and TP/ED/13/0686.”
2. On 4 April 2014, Mrs W wrote to the Council, requesting a review on the basis that it had failed to respond to her request.
3. On 2 June 2014, Mrs W wrote to the Commissioner regarding the Council's failure to respond to her requirement for review. Following this, the Commissioner issued *Decision 150/2014 Mrs W and East Dunbartonshire Council*, which required the Council to provide her with a response to her requirement for review.
4. The Council notified Mrs W of the outcome of its review on 28 August 2014. The Council informed Mrs W that it considered the requested information to be subject to legal professional privilege, and therefore excepted from disclosure in terms of regulation 10(5)(b) of the EIRs.
5. On 28 February 2015, Mrs W wrote to the Commissioner. She 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.

6. Mrs W stated she was dissatisfied with the outcome of the Council's review because the Council did not explain how disclosure would prejudice 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 (as required by regulation 10(5)(b)). She also stated that no reason was given as to why the public interest in making the information available was outweighed by that in maintaining the exception.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mrs W made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. On 13 March 2105, the Council was notified in writing that Mrs W had made a valid application. The Council was asked to send the Commissioner the information withheld from her. The Council provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions. These focused on the requirements of regulation 10(5)(b) of FOISA.
10. The Council responded and informed the Commissioner that it was now relying on regulation 10(5)(d) of the EIRs, instead of regulation 10(5)(b). It provided arguments in support of its position.

Commissioner's analysis and findings

11. 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 her by both the Council and Mrs W. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

12. It is clear from the Council's correspondence with both Mrs W and the Commissioner, and from the information itself, that the information sought by Mrs W is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. Mrs W made no comment on the Council's application of the EIRs in this case and the Commissioner will consider the request in what follows solely in terms of the EIRs.

Regulation 10(5)(d) of the EIRs – confidentiality provided for by law

Did the exception apply?

13. Regulation 10(1) of the EIRs provides that a public authority may refuse to make environmental information available if one or more of the exceptions in regulations 10(4) and (5) applies to that information and, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception or exceptions. It should be noted that, under regulation 10(2), authorities are required to interpret the exceptions in a restrictive way and to apply a presumption in favour of disclosure.
14. The exception in regulation 10(5)(d) provides 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. The Council submitted that all the withheld information was covered by this exception.

15. In its publication, *The Aarhus Convention: an implementation guide*¹, the Economic Commission for Europe (the United Nations agency responsible for the Convention the EIRs are designed to implement) notes, at page 86, that the Convention does not comprehensively define "proceedings of public authorities". It 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.
16. The Council referred to the above implementation guide and submitted that the withheld information related to it carrying out its functions under sections 42 and 75 of the Town and Country Planning (Scotland) Act 1997² (the TCPSA). In particular, it related to the process of obtaining legal advice in connection with the exercise of these functions. The Council submitted that this process should be accepted as "relevant proceedings" for the purpose of regulation 10(5)(d).
17. The Commissioner is satisfied that obtaining legal advice in connection with the exercise of the statutory functions described by the Council can be accepted as falling within the "proceedings" for the purposes of regulation 10(5)(d). For the exception in regulation 10(5)(d) to apply, the Commissioner must go on to consider whether disclosure of the information would, or would be likely to, prejudice substantially the confidentiality of these proceedings. Firstly, she must be satisfied that the proceedings are confidential, such confidentiality being provided for by law.
18. There may be a specific statutory provision relating to the confidentiality. There will also be cases where the common law of confidence protects the confidentiality of the proceedings. For information to be confidential under the common law, two main requirements must be met. These are:
 - (i) the information must have the necessary quality of confidence about it. It must not be generally accessible to the public already; and
 - (ii) the information must have been communicated in circumstances importing an obligation of confidentiality. The obligation may be express (for example, in a contract or other agreement), or implied from the circumstances or the nature of the relationship between the parties.
19. Here, the Council submitted that it considered that the common law of confidence applied. It identified one aspect of this as the law relating to confidentiality of communications, which embraces the rules and principles applying to legal professional privilege.
20. To have the necessary quality of confidence, the information should not be generally accessible. In this regard, the Commissioner acknowledges that all of the withheld information

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.aspx>http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf (Second edition)

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.aspx>
<http://www.legislation.gov.uk/ukpga/1997/8/contents>

can be considered to be the seeking and provision of legal advice from the Council's external solicitors: from the terms of the request, that is all it can be.

21. In her submissions to the Commissioner, Mrs W stated that the legal advice had previously been published on the Council's website. She further submitted that, during the Public Inquiry regarding the planning application, from 2008 to 2010, "all the information" was made public, in particular to KWAG (Kilmardinny Westpark Action Group), and this included exchanges between solicitors acting for the Council and developers as well as all correspondence to and from the Reporter.
22. The Council pointed out that the withheld information related to the legal advice given to the Council following the appeal. This had not been shared with KWAG, or anyone else, at any time. On balance, the Commissioner accepts this. There is nothing, either in the withheld information or elsewhere, to suggest that this particular correspondence has ever been made public or disclosed to any sector of the public. In addition, there is nothing in Mrs W's submissions to suggest that communications seeking or providing legal advice (as opposed to other communications involving solicitors) have been made public, or otherwise shared, in the course of processes related to this development.
23. Having considered all of the submissions on this point, the Commissioner accepts that the withheld information had the necessary quality of confidence.
24. The Commissioner also accepts, given the nature of the relationship between client and solicitor, that communications of the kind withheld here attract an implied obligation of confidence. The communications meet all of the requirements for legal advice privilege, itself an aspect of the common law of confidence. They are communications in the course of which legal advice is sought and given, by professional legal advisers acting in that capacity and in the context of a professional relationship with their client (i.e. the Council).
25. The Commissioner must also consider whether the confidentiality identified above would have been, or would have been likely to have been, prejudiced substantially by making the withheld information available. The Council submitted that it would be. The nature of the legal advice would be disclosed at a time when the issues discussed remained current and subject to potential litigation. It explained that there were, and would continue to be, occasions when it had to obtain impartial and expert legal advice to ensure the legitimacy of its actions. Making the information available, it argued, would substantially inhibit officers from seeking and giving legal advice in this manner, thus affecting the Council's decision making.
26. The Commissioner is clear that the test of substantial prejudice is a high one, requiring a real risk of actual, significant harm. That said, given the content of the information and its inherently confidential nature, and having taken full account of the Council's arguments, the Commissioner accepts that making this information available would have caused, or would have been likely to cause, substantial prejudice to the confidentiality of the Council's proceedings. Therefore, the exception in regulation 10(5)(d) applied. She must now consider whether the public interest in making the information available was outweighed by the public interest in maintaining that exception.

Public interest test

Submissions by Mrs W

27. Mrs W provided background information on the development in question. She highlighted the importance of the public having confidence in the planning system. She considered much to have happened behind closed doors in relation to the current proposal, leading to wide

mistrust of the actions and administration of the planning authority. She highlighted that the application was about publicly-owned land and a substantial residential development. It was also about planning processes and administration of duties being done correctly, which she submitted was a public domain issue.

28. Mrs W stated that the affected community did not understand how the present development proposal could be consistent with either the letter or the spirit of the planning system, highlighting particular concerns relating to its implementation. This had led to widespread distrust of the Council's conduct. She stated that, in order to restore this trust, it was in the public interest that the information requested be made available.

Submissions by the Council

29. The Council acknowledged the public interest in making available information which would promote a greater awareness of environmental matters, more effective participation by the public in environmental decision making and a better environment. It did not accept that making the information requested by Ms W available would further such aims.
30. The Council submitted that in discharging statutory duties and exercising discretionary powers, it must ensure that it acted lawfully and in a way which would not undermine its ability to function for the greater public good. It highlighted the need to obtain impartial and expert legal advice to ensure the legitimacy of its actions, which might be subject to legal challenge by groups holding conflicting views. The Council considered it essential to be able to obtain and consider comprehensive and frank legal advice in private on such occasions, if it and other public authorities were not to be disadvantaged.
31. The Council could identify no wider general public interest in making the information available. Given that the issues were current and could still give rise to litigation, it believed making the information available could potentially jeopardise its position. It highlighted that the Courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal advisor and client, on administration of justice grounds.
32. On balance, the Council concluded that the public interest in maintaining the exception outweighed the public interest in making the information available.

The Commissioner's view

33. The Commissioner has considered the representations made by both Mrs W and the Council carefully. She acknowledges that there is a public interest in the transparency and accountability expected of all authorities, and that making the information available would go some way to promoting such transparency and accountability in this case.
34. 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. In a freedom of information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC 164 (QB). Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of regulation 10(5)(d) of the EIRs (and section 36(1) of FOISA).
35. Consequently, while she will consider each case individually, she is likely only to order the disclosure of privileged communications (and confidential communications generally) in highly compelling cases only.

36. The Commissioner acknowledges that there may be occasions on which the significant public interest in withholding legally privileged communications will be outweighed by a compelling public interest in making the information available. In this particular case, she acknowledges the views of Mrs W regarding the processes followed by the Council in relation to the development in question. There is a clear public interest in the community understanding how a particular development proposal has been handled by the Council, to the extent that this is not already apparent from information in the public domain. To some extent, the withheld information would appear to be relevant to the issues highlighted by Ms W.
37. On the other hand, the Commissioner must consider any information which is the subject of legal professional privilege in the light of the established, inherent public interest in maintaining the confidentiality of communications between legal adviser and client. Any countervailing public interest would need to be compelling.
38. Having considered the public interest arguments advanced on both sides, the Commissioner is not satisfied that the public interest in making this particular information available outweighs the public interest in maintaining the confidentiality of communications between legal adviser and client. It is in the public interest that reasonable expectations of confidentiality be maintained, and in particular that (where necessary) an authority can communicate with its legal advisers freely and frankly in confidence, with a view to performing its statutory functions effectively.
39. In all the circumstances, therefore, the Commissioner concludes that the strong public interest in maintaining the exception outweighs such public interest as exists in making the information available. She is, therefore, satisfied that the Council was entitled to withhold the information requested under regulation 10(5)(d) of the EIRs.

Commissioner's observations about the handling of the request and review

40. The following observations are not part of the Commissioner's findings on compliance with the EIRs, but cover practice issues the Commissioner has identified during this investigation and about which she has concerns. She hopes these comments are helpful to all Scottish public authorities and requesters. In particular the Commissioner notes the time taken from Mrs W's initial request of 31 March 2014 until the date of this Decision Notice being issued.
41. The Commissioner notes that Mrs W's request for information was already the subject of Decision 154/2015, regarding the Council's initial failure to respond as mentioned above. As Mrs W made her request for review on 4 April 2014, the Council should have responded by 5 May 2014.
42. Mrs W did not receive her response until 28 August 2014, following her initial application to the Commissioner. A delay of over three months.
43. Whilst the failure to respond within timescales was dealt with in Decision 150/2014, the Commissioner would draw the Council's attention to Module 1 of the Self-Assessment Toolkit, "Responding on Time"³. She would ask the Council to consider whether there are steps it can take to monitor compliance with timescales and adjust practice, to minimise the likelihood of failing to respond on time in the future.

³ <http://www.itspublicknowledge.info/ScottishPublicAuthorities/Self-AssessmentToolkit/Self-AssessmentToolkit.aspx>

44. The Commissioner further notes that it was only during this current investigation that the Council intimated it wished to rely on regulation 10(5)(d) of the EIRs to withhold the information requested. Whilst public authorities are allowed to change which exception they wish to rely upon during an investigation, the Commissioner does not consider this to represent good practice in this case. Doing so at that stage (when there appears to have been no reason why this could not have been done considerably earlier) added both time and complexity to what should have been a straightforward EIRs response.
45. In this particular case, considering the content and context of the request, the information sought could only be interpreted as falling within the scope of that exception, as agreed in the decision as outlined above. The Commissioner considers this to be a straightforward interpretation, supported in previous decisions, and one that should have been recognised by the Council from the outset.
46. The Council's withdrawal of its initial claim that regulation 10(5)(b) of the EIRs was engaged came early in the Commissioner's investigation. This suggests that the application of this exception was not properly considered. It appears that the matter was only fully considered once the investigation had commenced.
47. The Commissioner considers that had the Council applied the exception under regulation 10(5)(d) of the EIRs at the outset (and in any case at the review stage), it would have been able to provide Mrs W with more specific and informative advice on its position, under its duty to provide advice and assistance in terms of regulation 9 of the EIRs.
48. Overall the Commissioner cannot stress enough the importance of dealing with requests within the time allowed by both FOISA and the EIRs, and in giving proper consideration to which exemption or exception may apply to the information held. Proper consideration and response, including advice where necessary, may avoid the need for applicants to seek the intervention of the Commissioner.

Decision

The Commissioner finds that East Dunbartonshire Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mrs W.

Appeal

Should either Mrs W or East Dunbartonshire Council 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.

Rosemary Agnew
Scottish Information Commissioner

12 November 2015

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;
- (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)-

...

(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;

...

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