

Decision Notice



Decision 208/2011 The St Andrews Preservation Trust Limited and Fife Council

Planning application for Feddinch Mains, St Andrews

Reference No: 201100790
Decision Date: 18 October 2011

www.itspublicknowledge.info

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Summary

The St Andrews Preservation Trust Limited (the Preservation Trust) requested from Fife Council (the Council) information relating to planning applications for Feddinch Mains, near St Andrews. The Council provided certain information falling within the scope of the request, but withheld other information under certain exceptions in the EIRs. Following a review, the Preservation Trust remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner found that the Council had failed to deal with the Preservation Trust's request for information in accordance with the EIRs, in wrongly withholding certain information on the basis that its disclosure would substantially prejudice the course of justice. He required the Council to provide the Preservation Trust with that information, after redacting certain personal data not required by the Preservation Trust.

Relevant statutory provisions and other sources

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 5(1) and (2)(b) (Duty to make available environmental information on request) and 10(1), (2) and (5)(b) (Exceptions from duty to make environmental information available)

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

Background

1. On 20 August 2010, the Preservation Trust wrote to the Council in relation to planning application 10/01522/FULL (construction of a new access road and parking area, Feddinch Mains, Fife) and requested "all emails, correspondence and file notes in relation to contact with the applicant and other services within the Council, in relation to this application".
2. On 15 September 2010, the Preservation Trust clarified that it also wished to receive similar information about previous applications relating to Feddinch, from the beginning of August 2006 onwards.



3. The Council responded on 5 October 2010. It offered to make arrangements for the updated planning file to be inspected at its offices and provided certain information falling within the scope of the request. However, it advised that other relevant information held by the Council was exempt from disclosure under regulations 11 and 10(5)(b) and (e) of the EIRs, and gave reasons for this decision.
4. On 24 November 2010, the Preservation Trust wrote to the Council requesting a review of its decision. It did not accept that it was in the public interest to withhold the information detailed in the Council's letter.
5. On 22 December 2010, the Council notified the Preservation Trust of the outcome of its review. As the Preservation Trust had not requested a review of the Council's decision to withhold personal information, it had not included this part of the decision in its review, but offered to reconsider this if the Preservation Trust wished it to do so. The Council explained why, in its view, the public interest was best served by withholding information which was internal legal advice under both regulation 10(5)(b) and regulation 10(5)(e) of the EIRs.
6. On 26 April 2011, the Preservation Trust wrote to the Commissioner, stating that it 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.
7. The application was validated by establishing that the Preservation Trust had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

8. On 7 June 2011, the Council was notified in writing that an application had been received from the Preservation Trust and was asked to provide the Commissioner with any information withheld from it. The Council responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the Council (on 4 July 2011), giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA, which applies to applications made under the EIRs, subject to minor modifications) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on any provisions of the EIRs it considered applicable to the information requested, and to clarify certain points arising out of its handling of the case to date. The Council was asked to provide this information by 26 July 2011, and was warned that if no substantive response (or notification of any reasons for delay in responding) was received by this date, the Commissioner would assume that the Council had no submissions to put forward and would decide the case accordingly.



10. As no response has been received from the Council during or since the specified period, the Commissioner has taken into account the arguments and information contained in the Council's responses to the Preservation Trust's information request and request for review.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both the Preservation Trust and the Council and is satisfied that no matter of relevance has been overlooked.

Scope of the application

12. In its application for a decision from the Commissioner, the Preservation Trust confirmed that it did not wish to receive personal information. Therefore, the Commissioner will not consider further the Council's decision to withhold certain information under regulation 11 of the EIRs (or its decision not to address this aspect of the case as part of its review).

Regulation 10(5)(e) of the EIRs

13. Although the Council's review response cited the exception in regulation 10(5)(e) of the EIRs, it did not provide any arguments relating solely or specifically to this exception. When the Council provided the Commissioner with a schedule of withheld information for the purposes of his investigation, it referred only to regulation 10(5)(b). From this, the Commissioner understands that the Council no longer wishes to rely upon regulation 10(5)(e) in relation to the withheld information, and therefore he has not considered its application further in this decision notice.

Regulation 10(5)(b) of the EIRs

14. Regulation 10(5)(b) of the EIRs 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 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.
15. Although there is no definition within the EIRs of what would constitute substantial prejudice, it is the Commissioner's view that the standard to be met in applying this test is high. The word "substantial" is important here: the harm caused, or likely to be caused, by disclosure must be of some real and demonstrable significance. The risk of harm must be real or very likely, not simply a remote or hypothetical possibility.



16. The Aarhus Convention: An Implementation Guide explains the principles behind that part of the exception relating to the course of justice in the following way (at page 59):

"The course of justice refers to active proceedings within the courts. The term 'in the course of' implies that an active judicial procedure capable of being prejudiced must be under way. This exception does not apply to material simply because at one time it was part of a court case. Public authorities can also refuse to release information if it would adversely affect the ability of a person to receive a fair trial. This provision should be interpreted in the context of the law pertaining to the rights of the accused."
17. In this case, the Commissioner understands that the Council's decision to withhold information under regulation 10(5)(b) arises from the inhibition it believes disclosure would cause to its officers, both in seeking legal advice (thus diminishing the quality of its decision making) and in negotiating legal matters with solicitors acting for third parties.
18. The lack of any submission from the Council has forced the Commissioner to proceed without any detailed explanation of the context in which the withheld information exists and the purposes for which it was created. The Council's letter of 22 December 2010 simply refers to "legal matters" and "the legal process" without going into further detail, and describes the withheld information as "legal advice/internal correspondence or correspondence with a solicitor acting for a third party". The arguments on substantial prejudice, contained in the Council's letter of 5 October 2010, are basically as set out in the preceding paragraph: that letter refers to the withheld information as "legal advice and discussion of the legal options". The Commissioner has reached his decision on the basis of the information available to him.
19. Neither the wording of regulation 10(5)(b), nor the definition in the Implementation Guide to the Aarhus Convention, explicitly excepts documents to which a claim to confidentiality of communications could be maintained in legal proceedings, unlike section 36(1) of FOISA. However, the Commissioner has previously expressed the view that the exception in regulation 10(5)(b) may apply to information which is covered by legal professional privilege, particularly where a public authority is or is likely to be involved in litigation, as the course of justice requires that the public authority should be able fully to prepare a case¹.
20. However, the Commissioner does not accept that the information withheld from the Preservation Trust is information which, if disclosed, would prevent the Council or the developers from fully preparing a case for future litigation. There is, in any event, no evidence that such litigation is likely, or anything other than a general possibility.

¹ Decision 096/2006 - Mr George Waddell and South Lanarkshire Council - <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2006/200503134.asp>



21. While it is apparent from a report considered by the Council's North East Fife Area Committee on 11 May 2011 (available on the Council's website²) that a key issue in relation to this development is the lodging of a financial bond under a section 75 agreement, which could be enforced by court proceedings, the Commissioner's understanding from the report is that such proceedings are envisaged only if further work on the site is undertaken before the bond has been lodged. The Commissioner has not been made aware of any information or circumstances which would suggest that this is considered likely, or, for that matter, that it was considered likely at the time the Council dealt with the Preservation Society's information request or its request for review. Neither has he any basis for believing that any other proceedings are (or were) considered likely in relation to the development.
22. The report received by the North East Fife Area Committee, referred to above, contains a summary of the factual and legal position relating to the Feddinch Mains planning application. This includes a summary of the legal advice provided by the Council's solicitors in relation to the question of enforcement action, both in respect of the planning applications which are the subject of the Preservation Society's information request and the related section 75 agreement, and reflects the conclusions reached in the withheld information. While this report was published some time after the Council carried out its review, it is not evident to the Commissioner that the information he has just described would have been any more sensitive at that earlier point than at the time it was published: in any event, no reason for it losing sensitivity over that intervening period has been brought to his attention.
23. Although some of the withheld information includes requests from planning officers to the Council's solicitors for legal advice, or comprises correspondence with the developers' solicitors, the Commissioner does not accept that the disclosure of this information would, or would be likely to, prejudice substantially the course of justice by revealing the position of either the Council or the developers, to the substantial prejudice of the Council's position in future court proceedings. Having considered the content of the withheld information, and taking account of the information published in the 11 May Committee report, he can identify no basis (particularly in the absence of detailed arguments on this point from the Council) on which he might conclude that such prejudice could be expected to follow from disclosure, even if he were to find any relevant litigation to be likely.
24. In summary, therefore, the Commissioner does not consider that disclosure of this information would, or would be likely to, prejudice substantially the course of justice. The Commissioner does not consider (on the evidence available to him) that the relevant conditions for engaging regulation 10(5)(b) are met in this case.
25. Having found that the exception in regulation 10(5)(b) of the EIRs does not apply to the information withheld from the Preservation Trust, the Commissioner is not required to consider whether, in all the circumstance, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)). The Commissioner therefore requires the Council to provide the Preservation Trust with the information withheld.

² http://admin.1fife.org.uk/uploadfiles/publications/c64_Item06-FeddinchMainsUpdateReport.doc



26. As the Preservation Trust did not seek to challenge the Council's decision to withhold personal information under regulation 11 of the EIRs, the Commissioner accepts that the Council can, if it chooses, withhold personal information along the lines indicated in the Council's letter of 5 October 2010.

DECISION

The Commissioner finds that Fife Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by The St Andrews Preservation Trust Limited (the Preservation Trust). The Council wrongly withheld certain information under regulation 10(5)(b) of the EIRs and thereby failed to comply with regulation 5(1).

The Commissioner therefore requires the Council to provide the Preservation Trust with this information (i.e. the information withheld by the Council, with the exception of personal data redacted under regulation 11 of the EIRs) by 9 December 2011.

Appeal

Should either the Preservation Trust Limited or Fife 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 notice.

Kevin Dunion
Scottish Information Commissioner
18 October 2011



Appendix

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

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-
...

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- (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;

...