

Decision Notice



Decision 144/2009 Mr Y and Highland Council

Meetings with Tesco

Reference No: 200900815

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Summary

Mr Y asked Highland Council (the Council) for information about meetings between Councillors and Council officials and representatives of Tesco, in relation to a particular planning application. The Council provided answers to most of Mr Y's questions, but did not address one of his requests to his satisfaction. Following a review, the Council advised Mr Y that he had been provided with all information which was held by the Council and which fell within the scope of his request. Mr Y remained dissatisfied and applied to the Commissioner for a decision.

After investigation, the Commissioner accepted that the Council did not hold any more information covered by the terms of Mr Y's request, and that it had complied with the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to Mr Y's request.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions); 17(1) (Notice that information is not held) and 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of environmental information) and (2) (Interpretation); 5(1) and (2) (Duty to make available environmental information on request) and 10(1) and (4)(a) (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 6 December 2008, Mr Y sent an email to the Council with a number of questions and requests for information relating to meetings held between Councillors and Council officials and representatives of Tesco, during the period between the Council's initial rejection of a planning application from Tesco (March 2007) and its subsequent approval on 2 December 2008.



2. In point 4 of his email, Mr Y asked whether other, less formal, meetings and telephone conversations had taken place between the various Council officials and Tesco representatives on the subject of the planning consent and approval, and whether the Council's Chief Executive had been kept fully informed about these informal communications. In point 5 of his email, Mr Y also asked which Councillors had met Council officials responsible for making recommendations on the planning application, and whether such meetings had been recorded, including the Councillors' views on a development of reduced scale.
3. The Council responded on 16 January 2009. It addressed each of the points raised by Mr Y. In relation to point 4, it advised Mr Y, in line with section 17(1) of FOISA, that no meetings had taken place between the planning case officer and Tesco representatives, and that the case officer had had no meeting with any Councillor to discuss the current application. In relation to point 5, it advised, again in line with section 17(1) of FOISA, that the case officer had had no meeting with any Councillor to discuss the site or the application.
4. On 22 January 2009, Mr Y asked the Council to reconsider its response in relation to the requests contained in points 4 and 5 of his request, as the Council's reply had not confirmed whether Councillors had held informal meetings with Tesco representatives. The Commissioner has accepted that this email was a request for a review in terms of section 20(1) of FOISA.
5. On 28 January 2009, the Council advised Mr Y that it did not hold details of meetings attended by individual Councillors apart from official committees and working groups, and was not required to seek this information from Councillors as a result of a request under FOISA. The Council confirmed that Mr Y had been provided with all the information held by the Council which fell within the scope of his request.
6. On 24 April 2009 (and after some correspondence with the Commissioner's office), Mr Y wrote to the Commissioner expressing dissatisfaction with the outcome of the review and applying 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. Mr Y was concerned that, in the context of a contentious planning application for a major supermarket in Inverness, he had been unable to ascertain whether individual Councillors had held off-the-record meetings with representatives of Tesco. He noted that a number of Councillors had dropped their previously stated opposition to the supermarket. He believed that the public should have a right to know about the activities of Councillors which may affect the outcome of major planning decisions.
7. The application was validated by establishing that Mr Y 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

8. After some correspondence between Mr Y, the investigating officer and the Council, it was established that Mr Y was seeking details of meetings held between 13 March 2007 (the date on which the planning application was previously rejected) and 6 December 2008 (the date of his request).
9. On 9 July 2009, the Council was notified in writing that an application had been received from Mr Ward and was given an opportunity to comment on the application (as required by section 49(3)(a) of FOISA, which, in line with regulation 17 of the EIRs, applies for the purposes of the EIRs as it applies for the purposes of FOISA).
10. The Council was asked to check the email accounts of officials in the Council's planning department to establish whether it held any emails received from, or sent to, Councillors during the period in question, which made reference to Tesco's plans for the Holm Mains site in Inverness. The Council was also asked to check whether these officials held any other emails from this period which referred to the proposed development at Holm Mains. If any such emails were found, the Council was asked to advise whether they included reference to any meetings between Tesco and Councillors or Council officials.
11. The Council was asked to provide details of the extent of the email searches carried out.
12. The Council provided a list of staff who had carried out searches of their email in-boxes and "sent" folders. It advised that the list was not limited to officials in the planning department, but included all officials identified as being involved with Councillors in relation to the Tesco planning application, plus committee staff and the relevant Ward Manager (the Council official charged with efficient delivery of services within the ward). The Council had also carried out a search of the email archive of a former Director, who had been in post in 2007.
13. The Council explained that the terms "Tesco", "Holm Mains", and "Ness-side" had been used in the searches, and enclosed copies of all emails which had been retrieved. Only one of the emails retrieved referred to a meeting with Tesco between 13 March 2007 and 6 December 2008, but the Council believed that information in some of the other emails demonstrated the distance maintained by Council staff in terms of their relationship with Tesco representatives.
14. The Council provided copies of the planning reports presented to the Council's Planning Applications Committee on 13 March 2007, recommending refusal, and on 2 December 2008, recommending approval. The Council believed that a comparison of the contents of these reports explained why Councillors voted differently on the two occasions.



15. Under section 50 of FOISA, which, in line with regulation 17 of the EIRs, applies for the purposes of the EIRs as it applies for the purposes of FOISA, the Commissioner can require a Scottish public authority to provide unrecorded information if it is reasonably required for the purpose of determining whether the authority has complied with FOISA. The Council was asked whether it was aware of any informal meetings having been held between Council officials or elected members and Tesco or its representatives, during the period in question, regardless of whether the details of such meetings were recorded.
16. The Council confirmed that, after making enquiries to Councillors and Council officials involved with the application, it was not aware of any meetings other than a public meeting, the details of which had already been provided to Mr Ward.
17. Mr Y was asked whether he could provide any further information which would indicate that other meetings had, in fact, been held. However, Mr Y did not offer any further comment on this point.
18. During the investigation, the Council was advised that the Commissioner found the case fell to be dealt with under the EIRs rather than FOISA. The Council accepted this, and claimed the exemption in section 39(2) of FOISA. This is discussed further in the next part of the Decision Notice.

Commissioner's analysis and findings

19. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mr Y and the Council and is satisfied that no matter of relevance has been overlooked.

EIRs or FOISA?

20. In Decision 218/2007 Professor A D Hawkins and Transport Scotland, the Commissioner considered the relationship between FOISA and the EIRs at some length and set out his understanding of the situation. Broadly, the Commissioner's general position on the interaction between the two regimes is as follows:
 - The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition set out in the EIRs
 - There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs
 - Any request for environmental information therefore must be dealt with under the EIRs



- In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2)
 - If the authority does not choose to claim the section 39(2) exemption it must deal with the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these).
 - The Commissioner is entitled (and indeed obliged) where he considers a request for environmental information has not been dealt with under the EIRs to consider how it should have been dealt with under that regime.
21. Environmental information is defined in regulation 2(1) of the EIRs, and this definition is reproduced in full in the Appendix to this decision. Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to the exceptions contained within regulation 10 and the provisions of regulation 11, and certain other restrictions set out in the EIRs.
22. The Commissioner considers that if any meetings of the type detailed in Mr Y's request had taken place, the discussions at those meetings could have influenced the approval or rejection of the re-submitted planning application. Information about such meetings, had they been held, would therefore be information about activities affecting, or likely to affect, the state of the elements of the environment, or factors affecting, or likely to affect, the elements of the environment in relation to the site of the proposed development for which planning consent had initially been refused.
23. The Commissioner therefore considers that any information about such meetings, had they taken place, would fall within the definition of environmental information contained in regulation 2(1)(a), (b) and (c) of the EIRs.

Section 39(2) of FOISA – exemption for environmental information

24. As noted above, the Council accepted, during the investigation, the preliminary view expressed by the Commissioner that any information held would fall under the definition of environmental information and so indicated that it wished to apply the exemption in section 39(2) of FOISA.
25. As the Commissioner considers that the information requested by Mr Y, if held by the Council, would be environmental information, he considers that the Council was correct in its application of section 39(2) of FOISA.
26. The exemption in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. Since there is a separate legislative right of access to environmental information (via the EIRs), the Commissioner also accepts that in this case the public interest in maintaining this exemption and dealing with the requests under the EIRs outweighs any public interest there may be in considering the disclosure of any information under FOISA. In what follows, the Commissioner has therefore made his decision solely in terms of the EIRs.



Information held and not held by the Council

27. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received.
28. On 28 January 2009, the Council advised Mr Y that it did not hold details of meetings attended by individual Councillors apart from official committees and working groups.
29. The Council has carried out searches of the email accounts of key officials at the request of the Commissioner (see paragraphs 10 – 13 above). The Commissioner has examined the emails retrieved by the Council. Only one email falling within the period covered by Mr Y's request (email of 11 August 2008) includes reference to a meeting with Tesco between 13 March 2007 and 6 December 2008. The contents of the email serve only to confirm the details of meeting place, time and attendees. A description of the meeting (a public meeting which took place on 14 August 2008) was included in the Council's response to Mr Y's request.
30. The other emails retrieved by the Council do not refer to meetings with Tesco or its representatives, but include correspondence between Council officials relating to the planning application and related correspondence with an agent for Tesco. There is evidence in some of the emails that the Council took pains to avoid actions which, it understood, could appear to compromise the impartiality with which Council officials dealt with correspondence from the agent for Tesco.
31. The Commissioner accepts that the Council has carried out searches which were thorough and extensive enough to retrieve any information it held about informal meetings between Councillors or Council officials and Tesco or its representatives. The Commissioner accepts that the Council has demonstrated that it does not hold more information on this matter than has already been provided to Mr Y.
32. As such, the Commissioner is satisfied that information about Councillors' meetings with Tesco or its representatives between 13 March 2007 and 6 December 2008 is subject to the exception in regulation 10(4)(a) of the EIRs.
33. The exception set out in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs. Therefore, a public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception. In this case, the Commissioner is satisfied that the information in question is not (and was not at the time of Mr Y's request) held by the Council. Consequently, he does not consider there to be any conceivable public interest in requiring that the information be made available.



DECISION

The Commissioner finds that Highland Council complied with the Environmental Information (Scotland) Regulations (the EIRs) in responding to the information request made by Mr Y. The Commissioner finds that the Council was entitled to refuse Mr Y's request in terms of section 39(2) of the Freedom of Information (Scotland) Act 2002 and regulation 10(4)(a) of the EIRs.

Appeal

Should either Mr Y or Highland 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.

Margaret Keyse
Head of Enforcement
17 December 2009



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 –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

17 Notice that information is not held

- (1) Where –
 - (a) a Scottish public authority receives a request which would require it either –
 - (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),if it held the information to which the request relates; but
 - (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.



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;
- (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);

...

- (2) For the purpose of these Regulations, environmental information is held by a Scottish public authority if it is-
- (a) in its possession and it has been produced or received by that authority; or
 - (b) held by another person on that authority's behalf,

and, in either case, it has not been supplied by a Minister of the Crown or department of the Government of the United Kingdom and held in confidence.

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.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that
- (a) it does not hold that information when an applicant's request is received;

...