

Decision Notice



Decision 058/2010 Mr Robert Hogg and the City of Edinburgh Council

Legal advice

Reference No: 200902030
Decision Date: 27 April 2010

www.itspublicknowledge.info

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr Robert Hogg requested from the City of Edinburgh Council (the Council) information relating to legal advice obtained by the Council in relation to a planning matter. The Council responded by advising Mr Hogg that it considered the information to be exempt from disclosure in terms of section 36 of FOISA. Following a review, Mr Hogg remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Commissioner took the view that the information comprised environmental information and asked for the Council's comments as to whether the request should have been dealt with under the Environmental Information (Scotland) Regulations 2004 (the EIRs). The Council did not agree that the information was environmental. However, it indicated that should the Commissioner continue to consider the case under the EIRS, it would wish to rely on section 39(2) of FOISA and upon the exception contained in regulation 10(5)(d) of the EIRs for withholding the information.

Following an investigation, the Commissioner found that the Council had correctly withheld some of the information requested by Mr Hogg in terms of regulation 10(5)(d) of the EIRs. However, he also concluded that privilege in respect of some of the legal advice had been lost and that the confidentiality of this information was no longer in place at the time of Mr Hogg's request. The Commissioner concluded that that the exception in regulation 10(5)(d) did not apply to this information, and he required the Council to release this to Mr Hogg.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions) and 39(2) (Health, safety and the environment)

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) and 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. On 29 September 2009, Mr Hogg emailed the Council requesting any information relating to consultations held by the Council with Senior Counsel concerning a planning development at Freelands Road, Ratho and a potential legal challenge to a decision of the Council's Planning Committee.
2. The Council emailed Mr Hogg on 28 October 2009, advising him that it was handling his request in terms of the EIRs on the basis that the information requested related to the built and natural environments. The Council requested an extension of the period of time allowed for complying with the request under regulation 7 of the EIRs, stating that it was impracticable to reply within the statutory timescale due to the complexity of the information requested.
3. On 29 October 2009, Mr Hogg emailed the Council requesting a review of its failure to provide a response to his request for information. Mr Hogg pointed out that regulation 7 of the EIRs allows extension of the timescale for response only where the volume and complexity of the information requested makes it impractical for an authority to respond within the 20 working day timescale. He maintained that the information requested was not in itself voluminous or particularly complex. He went on to argue that it was not sufficient to claim that "some complex issues have arisen", when the EIRs require an authority to explain its reasons for considering the information to be voluminous and complex.
4. The Council notified Mr Hogg of the outcome of its review on 16 November 2009. The Council provided some information about its consultations with Counsel, including the dates and purposes of two consultations and the names of attendees at these meetings. However, the Council advised Mr Hogg that it considered the information held in regard to the legal advice provided by Counsel to be exempt from disclosure under section 36 of FOISA.
5. On 24 November 2009, Mr Hogg emailed 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.
6. The application was validated by establishing that Mr Hogg 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

7. On 27 November 2009, the Council was notified in writing that an application had been received from Mr Hogg and was asked to provide the Commissioner with the information which had been withheld from Mr Hogg. The Council responded with the information requested (which comprised notes taken by a Council official at a consultation with Senior Counsel) and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was advised that, having viewed the information previously supplied by it, the investigating officer was of the opinion that the withheld information was likely to fall under the definition of environmental information as defined in regulation 2(1) of the EIRs. The Council was asked to comment on this point and provide submissions on whether it considered the information withheld to fall under the scope of any of the exceptions contained in the EIRs. The Council was also asked whether it wished to rely on section 39(2) of FOISA, which allows Scottish public authorities to exempt information from disclosure under FOISA if it is environmental information which the authority is obliged to make available to the public in accordance with the EIRs.
9. In its response, the Council submitted that it did not consider the information to be environmental and that, whilst it had initially responded to Mr Hogg's request in terms of the EIRs, it now believed it had been correct in considering Mr Hogg's request in terms of FOISA rather than the EIRs.
10. The Council provided the Commissioner with detailed submissions regarding its application of the exemption in section 36(1) of FOISA and its application of the public interest test.
11. The Council added that, if the Commissioner did not accept that the withheld information fell to be considered under FOISA, but rather that it required to be dealt with under the EIRs, then it would wish to rely on the exemption contained in section 39(2) of FOISA and the exception contained in regulation 10(5)(d) of the EIRs to the withheld information. The Council submitted that its arguments in relation to the application of section 36(1) of FOISA applied to the application of regulation 10(5)(d) of the EIRs.
12. In his submissions to the Commissioner, Mr Hogg argued that the Council had effectively waived legal advice privilege in relation to the withheld information by divulging its content in a written report to the Council's Planning Committee. Mr Hogg's submissions are summarised and discussed in the Commissioner's analysis and findings section below.



Commissioner's analysis and findings

13. 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 Mr Hogg and the Council and is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

14. While the Council argued that the withheld information was not environmental information for the purposes of the EIRs, the Commissioner considers that his views set out in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*, in which he considered and set out his understanding of the relationship between FOISA and the EIRs at some length, are relevant here. Broadly, the Commissioner's 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 of environmental information 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 then **also** 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
15. The implication of Decision 218/2007 for the Commissioner's consideration of Mr Hogg's request is therefore that the Commissioner must first determine whether the information withheld is environmental information.
16. Environmental information is defined in regulation 2(1) of the EIRs. Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
17. The Council argued that the information under consideration did not come within the definition of environmental information for the purposes of the EIRs and referred to previous decisions of the Commissioner in support of its position.



18. The Council considered that the information withheld was a record of legal advice concerning administrative action of the Council and its consequences. The Council considered that none of the issues referred to within the withheld information dealt with any matter which could properly be considered environmental information for the purposes of the EIRs.
19. The Commissioner has taken account of the Council's submissions on this point. However, his view is that these would not prevent him from concluding that the information is environmental information and ought to have been considered in terms of the EIRs.
20. The withheld information contains a summary of discussions of options and tactics in response to potential legal action by a developer seeking to overturn the withdrawal of consent for a planning application. The Commissioner's view is that the withheld information relates to measures including decisions, procedures and plans of the Council, and its response to potential legal challenge. These measures affect or are likely to affect the state of the elements of the environment and factors affecting these, by influencing decisions (of the Council or the Courts) as to whether or not a particular development (which would have significant environmental effects in the area concerned) is allowed to proceed.
21. As such, the Commissioner considers the information falls within part (c) of the definition of environmental information contained in regulation 2(1) of the EIRs comprising information on measures affecting, or likely to affect the elements referred to in paragraph (a), and factors referred to in paragraph (b) of the definition (see the definition of environmental information as contained in parts (a) to (c) of regulation 2(1) of the EIRs, set out in the Appendix).
22. As the Commissioner considers that the information requested by Mr Hogg is environmental information, he also therefore considers that the Council was correct in its application of section 39(2) of FOISA.
23. The exemption in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner's view is that, in this case, as there is a separate statutory right of access to environmental information, the public interest in maintaining this exemption and allowing access in line with the requirements of the EIRs outweighs the public interest in the disclosure of information under FOISA. In what follows, therefore, the Commissioner will make his decision solely in terms of the EIRs.

Consideration of Regulation 10(5)(d)

24. 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 regulation 10(4) and (5) applies to that information 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. It should be noted that under regulation 10(2), authorities are required to interpret the exceptions in a restrictive way and apply a presumption in favour of disclosure.



25. Regulation 10(5)(d) 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 confidentiality of the proceedings of any public authority where such confidentiality is provided for by law.
26. In its publication *The Aarhus Convention: an implementation guide*, the Economic Commission for Europe (the United Nations agency responsible for the convention which the EIRs are designed to implement) 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.
27. 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. He must then consider whether disclosure of the information would, or would be likely to prejudice, substantially the confidentiality of those proceedings.
28. In many cases where this exception will apply, there will be a specific statutory provision prohibiting the release of the information. However, the Commissioner considers that there may also be cases where the common law of confidence will protect the confidentiality of the proceedings. An aspect of this is the law relating to confidentiality of communications, which embraces the rules and principles applying to legal professional privilege.
29. The Council submitted that the withheld information comprised information in respect of which a claim for confidentiality of communications could be maintained in legal proceedings. The Council stated that it considered the legal advice to be subject to legal advice privilege, one aspect of legal professional privilege.
30. The Council also submitted that the dangers in disclosing advice have been acknowledged in previous decisions of the Commissioner, including unreasonably exposing legal positions to challenge and thereby diminishing the range and quality of advice to a public body which in turn could damage the quality of decision making of that public body. The Council contended that, given the content of the information and its continuing privileged nature, disclosure would cause substantial prejudice to the confidentiality of the proceedings in question.
31. In the circumstances of this case, the Commissioner is satisfied that the information withheld is a record of legal advice provided by an adviser to a client within the context of a professional relationship in circumstances in which legal professional privilege could apply.



32. There is, however, one further fundamental requirement if the exception under regulation 10(5)(d) is to apply to information of this type – and, for that matter, before the information in question can be considered privileged. The withheld information must be information in respect of which a claim to confidentiality of communications (in this case in the form of legal advice privilege) could be maintained in legal proceedings. It must, therefore, have remained confidential at the time the Council dealt with Mr Hogg's information request and request for review. This will not be the case where information has at that time been made public, either in full or in a summary sufficiently detailed to have the effect of disclosing the whole.
33. This raises the issue of waiver raised by Mr Hogg. He has argued that the essence of the opinion is in the public domain already, and so suggests that it had ceased to be confidential (and so could no longer be held to be privileged) by the time that the Council considered his request and subsequent request for review. .

Was the information confidential?

34. As noted in *Decision 056/2010 William Lonsdale and the Scottish Further and Higher Education Funding Council*, information cannot be privileged unless it is also confidential. If a document or communication ceases to be confidential, it also ceases to be privileged. Whether or not a document or communication has ceased to be confidential will depend upon whether and to the extent that it has been made public, and on what terms.
35. In his submissions to the Commissioner, Mr Hogg argued that, in a report to the Planning Committee of 6 August 2009¹, the content of the legal advice obtained by the Council had effectively been disclosed. The report notes (at paragraph 3.7):
- “The Council has spoken to Counsel about the statutory challenge and the judicial review. It is his view that the statutory challenge will not be successful. However, he considers that there is a significant risk that the judicial review will result in the decision of 14 May being quashed by the courts”.
36. Having examined the withheld information, the Commissioner is satisfied that the Council has, to a significant extent, disclosed the substance of the legal advice provided to it which relates to the potential legal challenges against the decision of the Planning Committee.
37. The Commissioner is therefore satisfied that any privilege that at one time was attached to the information sought by Mr Hogg as it relates to those potential legal challenges and the Council's response thereto had been lost by the time that the Council considered his request and subsequent request for review.
38. The Commissioner cannot therefore accept that disclosure of the information which is summarised in the report to the Planning Committee would, or would be likely to, prejudice substantially the confidentiality of proceedings at the time of Mr Hogg's request, because any previous confidentiality in those proceedings was no longer in place at that time, and any privilege had been lost.

¹ http://cpol.edinburgh.gov.uk/getdoc_ext.asp?DocId=128968



39. As regulation 10(5)(d) can only be applied where the disclosure of the information would, or would be likely to, prejudice substantially the confidentiality of proceedings, and in this case, he has found that privilege has been waived in respect of some of the legal advice, the Commissioner finds that the exception in regulation 10(5)(d) does not apply to the parts of the withheld note which are summarised in the report to the Planning Committee.
40. The Commissioner therefore requires the Council to disclose the information contained in the relevant parts of the file note, i.e. the second paragraph and the final sentence of the third paragraph.
41. However, the Commissioner considers that there are other matters contained within the legal advice which remain confidential and to which privilege still applies and 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..
42. 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. However, given the content of the information and its privileged nature, the Commissioner accepts that disclosure would have caused, or would have been likely to have caused, substantial prejudice to the confidentiality of the Council's proceedings and, therefore, that the exception in regulation 10(5)(d) applied. He must therefore consider, as required by regulation 10(1)(b), whether the public interest in making the information available was outweighed by the public interest in maintaining that exception.

Public interest test

43. 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, there being many judicial comments on the fundamental nature of this confidentiality in our legal system. Many of the arguments in favour of maintaining confidentiality of such communications were discussed in *Three Rivers District Council and Others v Governor and Company of the Bank of England (2004) UK HL 48*. While the Commissioner has upheld this position in a number of his own decisions considering the application of this exception (for example, *Decision 069/2008 Robin Thompson and the Scottish Environment Protection Agency*), he is required to consider each case on an individual basis.
44. The Council submitted that the public interest in withholding legal advice is high and made reference to previous decisions of the Commissioner which it considered supported its position that the public interest in this case would favour maintaining the exception. The Council also stated that the notes taken by the Council official in this case had not been seen or approved by the Senior Counsel who gave the advice, nor were they approved by the Council solicitor responsible for providing legal advice and guidance to the Council.



45. In his submissions, Mr Hogg argued that disclosure of the information would contribute to a debate on a matter of public interest, enhance scrutiny of decision making processes and improve accountability and participation. Mr Hogg also considered that the disclosure of the information in a case such as this would send a clear signal to public bodies that it is necessary to properly document the decision making process and that legal privilege cannot be used to cover up an embarrassing oversight or as a catch-all to withhold information about decision making.
46. Having considered the submissions on the public interest, the Commissioner accepts that there is a public interest in the public having confidence in the Council's decision making processes and in enhancing scrutiny of these processes. On balance, however, he does not accept in this case that these arguments are substantial enough to outweigh the strong public interest in maintaining the confidentiality of the Council's proceedings in this case, as outlined above. Consequently, he is satisfied that the public interest in making the withheld information (in which privilege has not been lost) available is outweighed by that in maintaining the exception in regulation 10(5)(d) of the EIRs.
47. The Commissioner is therefore satisfied that the Council was correct to withhold all of the information contained in the file note in question except for that contained in the second paragraph and in the final sentence in the third paragraph.

DECISION

The Commissioner finds that the City of Edinburgh Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Hogg.

The Commissioner finds that the Council was entitled to rely on the exception in regulation 10(5)(d) of the EIRs to withhold some of the information contained in the note of the discussion with Senior Counsel. Consequently, he finds that, in withholding this information, the Council complied with the EIRs.

However, the Commissioner finds that the Council misapplied the exception in regulation 10(5)(d) to some of the information contained within that same note (in particular, the contents in the second paragraph and the final sentence of the third paragraph). By withholding this information, the Council failed to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires the Council to disclose to Mr Hogg the information noted above by 11 June 2010.



Appeal

Should either Mr Hogg or the 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
27 April 2010



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;
- (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;

...

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;
- ...