

Decision Notice



Decision 069/2010 Fairlie Community Council and the Scottish Ministers

New industry at Hunterston and National Planning Framework for Scotland

Reference No: 200901571
Decision Date: 19 May 2010

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Scottish Information Commissioner

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Summary

Fairlie Community Council (FCC) requested from the Scottish Ministers (the Ministers) information relating to the inclusion of new industry at Hunterston in the National Planning Framework for Scotland. The Ministers responded by providing certain of the information requested, or links to it where it considered the information to be reasonably accessible. The Ministers also withheld certain information they believed to be commercially sensitive under section 33(1)(b) of FOISA. Following a review, FCC remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which the Ministers acknowledged that they had incorrectly applied 33(1)(b) of FOISA to certain of the information withheld (which they then released to FCC) and that the request would more appropriately have been dealt with under the EIRs, the Commissioner found that the Ministers had provided FCC with all the relevant information they held and which fell within the scope of the request. Acknowledging that the remainder of the withheld information did not in fact fall within the scope of the request, he did not require the Ministers to take any action.

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) (definition of “environmental information”) (Interpretation); 5(1) and (2)(b) (Duty to make environmental information available on request) and 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available – information not held)

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 18 May 2009, FCC wrote to the Ministers requesting the following information:

“ . . all correspondence to and from these “stakeholders” in which new industry at Hunterston has been “proposed”, together with the minutes or notes of any meetings that may have taken place on the same subject leading up to the inclusion of this new industry within the National Planning Framework for Scotland.”



2. An initial response from the Ministers was issued on 18 June 2009, with a number of electronic links to information already available on the Scottish Government's website. The Ministers followed this up with a letter dated 28 July 2009, with a further electronic link to the Scottish Government's website. To all of this information, the Ministers applied the exemption in section 25 of FOISA (which applies where the applicant can reasonably obtain information other than by requesting it under section 1(1) of FOISA). They also provided copies of information they believed to be pertinent to FCC's request. Certain information, however, was withheld in terms of section 33(1)(b) of FOISA, on the basis that its disclosure would, or would be likely to, prejudice substantially the commercial interests of various parties.
3. On 2 August 2009, FCC wrote to the Ministers requesting a review of their decision. FCC drew the Ministers' attention to the time they had taken to respond to the request and stated that they did not agree with their application of 33(1)(b) of FOISA.
4. The Ministers notified FCC of the outcome of their review on 1 September 2009. They decided to release certain of the information previously withheld under section 33(1)(b), while upholding that exemption in respect of the remainder. The Ministers also addressed FCC's concerns regarding the time taken to respond to its request, apologising for the delay.
5. On 2 September 2009, FCC wrote to the Commissioner, stating that they were dissatisfied with the outcome of the Ministers' 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 FCC 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 21 September 2009, the Ministers were notified in writing that an application had been received from FCC and were asked to provide the Commissioner with any information withheld from them. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, they were asked for their views on whether the information requested by FCC should have been dealt with under the EIRs rather than under FOISA. They Ministers were also asked to justify their reliance on any provisions of FOISA and/or the EIRs they considered applicable to the information requested (noting their earlier reliance on section 33(1)(b) of FOISA) and to provide a detailed account of the searches they had undertaken to identify what relevant information they held.



9. In responding to the investigating officer, the Ministers advised that, following the review, there were two redacted items being withheld. One was withheld on the basis that it fell outwith the scope of FCC's request and the other on the basis of section 33(1)(b) of FOISA. During the investigation, however, the Ministers decided that they no longer wished to rely on section 33(1)(b) and proceeded to release to FCC certain information previously withheld under this exemption. The remainder of the withheld information, the Ministers argued, did not in fact fall within the scope of FCC's request.
10. FCC confirmed receipt of the previously withheld information, while also advising that they wanted the Commissioner to decide if the Ministers had been correct in responding to their request to withhold certain information on the basis of section 33(1)(b). FCC also expressed concerns as to whether the Ministers had identified all the relevant information they held.
11. FCC's concerns on the application of section 33(1)(b) related in particular to the minute of a meeting (document 2). In further submissions, the Ministers conceded that the information in this minute related to the subject matter of FCC's request only in part: the relevant part had been released in full in the Ministers' initial response to the request. Having considered the remaining information, the Commissioner accepts this. Consequently, he takes the view that he has no locus to consider item 2 further in this decision, although he does consider that it would have been helpful for the Ministers to clarify the position to FCC earlier.
12. The Commissioner's decision therefore focuses on whether additional information falling within the scope of FCC's request was held by the Ministers at the time of receiving that request.
13. The Ministers also accepted that the request should more appropriately have been dealt with under the EIRs rather than FOISA and consequently cited the exemption in 39(2) of FOISA. The Ministers also applied the exception contained in regulation 10(4)(a) of the EIRs, on the basis that it did not hold any additional information pertinent to FCC's request. The relevant submissions received from both parties will be considered more fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

14. 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 FCC and the Ministers and is satisfied that no matter of relevance has been overlooked.

FOISA or the EIRs?

15. 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:



- a. The definition of what constitutes environmental information should not be viewed narrowly
 - b. 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
 - c. Any request for environmental information therefore must be dealt with under the EIRs
 - d. In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2)
 - e. 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)
 - f. 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.
16. 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, the provisions of regulation 11 and certain other restrictions set out in the EIRs.
17. In this case, the Commissioner takes the view that the information requested (which relates to the inclusion of new industry at Hunterston in the National Planning Framework for Scotland (NPF2)), is environmental in that the proposed development would be a measure affecting or likely to effect the elements of the environment, principally air and atmosphere, water, land, landscape and natural sites (including coastal and marine areas). He therefore agrees with the Ministers' revised assessment that any information falling within the scope of the request, including any held by the Ministers but not provided to FCC in response to their request, would fall within the definition of environmental information as contained in regulation 2(1) of the EIRs.

Section 39(2) of FOISA

18. As previously noted, the Ministers decided to claim the exemption in section 39(2) of FOISA on accepting that the information requested was environmental information as defined in regulation 2(1) of the EIRs. As the Commissioner also considers the information requested by FCC to be environmental information, he also considers that the Ministers were correct in their application of section 39(2) of FOISA.



19. This exemption 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 available to FCC, the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs, outweighs any public interest in disclosure of information under FOISA. In what follows, therefore, the Commissioner has made his decision solely in terms of the EIRs.

Did the Ministers hold any relevant information in addition to that already provided to FCC?

20. 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.
21. In their submissions to the Commissioner, the Ministers explained that NPF2 had been prepared while the Scottish Government operated an electronic records and document management (eRDM) system. They stated that information regarding NPF2 had been stored on the eRDM system. The Ministers advised that they searched using key words and provided the Commissioner with the details of these key word searches. They also advised that a filtering process of the resulting documents had been undertaken to identify the documents and information within the documents relevant to the request.
22. Additionally, the Ministers confirmed that individual personal email inboxes had been searched and that the Scottish Government's Ports and Harbours Division had been consulted in case information falling within the scope of the request had been submitted to and filed by them. The Ministers confirmed, however, that no further information had been identified as a result of any of these searches.
23. Having considered the Ministers' submissions and the steps taken by them to ascertain whether it held additional information, the Commissioner is satisfied that no additional information falling within the scope of FCC's request was held by the Ministers at the time the request was received. The Commissioner would emphasise, however, that in coming to this decision, he acknowledges FCC's concern that more information *should* be held by the Ministers in this context, and indeed has taken their views on this point into account in assessing the Ministers' submissions. Ultimately, however, he can only consider what relevant recorded information *is* held by an authority and cannot speculate on what it possibly should (but does not) hold.
24. Consequently, the Commissioner is satisfied that the Ministers were correct to inform FCC that they did not hold any additional information relevant to their request.



Public interest test

25. The exception 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 refuse to make available 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 no additional information was actually held by the Ministers at the time FCC's request was received. Consequently he does not consider there to be any conceivable public interest in requiring that any information be made available.
26. The Commissioner therefore concludes that, in all the circumstances of this case, the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs. Consequently, he is satisfied that the Ministers were entitled to refuse FCC's request under regulation 10(4)(a) of the EIRs.

DECISION

The Commissioner finds that, in relation to the matters raised in Fairlie Community Council's application to him, the Scottish Ministers complied with Part 1 of the Freedom of Information (Scotland) Act 2002 and with the Environmental Information (Scotland) Regulations 2004.

Appeal

Should either Fairlie Community Council or the Ministers 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
19 May 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;
- (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.

...

- (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;

...