

Decision Notice



Decision 137/2010 Mrs Ann Wilson and Aberdeenshire Council

Legal dispute on a Right of Way at Pitullie, Aberdeenshire

Reference No: 200901753

Decision Date: 6 August 2010

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Scottish Information Commissioner

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Summary

Mrs Wilson requested from Aberdeenshire Council (the Council) all information held in connection to a specific legal dispute, specifying certain categories of information in particular. The Council responded by stating that it did not hold certain of the information specified, while withholding the remainder in terms of section 38(1)(b) (Personal information) and 36(1) (Confidentiality) of FOISA. Following a review, Mrs Wilson remained dissatisfied and applied to the Commissioner for a decision.

During the course of the investigation, the Council accepted that Mrs Wilson's information request should have been dealt with under the EIRs. The Council therefore relied upon section 39(2) of FOISA and the exceptions in regulations 10(5)(d) and 11 of the EIRs for withholding information.

Following an investigation, the Commissioner found that the Council had been entitled to deal with Mrs Wilson's request for information by relying upon section 39(2) of FOISA, the information requested being environmental information and therefore subject to the EIRs. In failing to respond to Mrs Wilson's request in line with the EIRs, however, it had failed to comply with its duty under regulation 5(1). However, he also found that the Council had been entitled to withhold the information under the exception in regulation 10(5)(d) of the EIRs (given that its disclosure would be likely to prejudice substantially the confidentiality of certain of the Council's proceedings) and therefore did not require it 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) (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 11 June 2009, Mrs Wilson wrote to the Council as follows:
Under the Freedom of information Act I request all information held by you as a public authority in connection to a Legal Dispute on a Right of Way at Pitullie Aberdeenshire Scotland AB43 7EU.
 - a *Final settlement agreement 27th April 2009 signed off in Peterhead Sheriff Court 12th May 2009.*
 - b *All correspondence from members of the public from 1990 till present time*
 - c *All submitted questionnaires and letters in respect of your inquiries*
 - d *All internal and external mail, computer files, emails and video*
 - e *Notes of Colin Miller and Eleanor Munro's survey*
 - f *Any evidence held by Aberdeenshire Council's Legal Department.*
2. On 20 July 2009, Mrs Wilson wrote to the Council again, noting that a response had not been received to her request of 11 June 2009 and repeating that request.
3. The Council responded on 27 July 2009, informing Mrs Wilson that it had not received her request of 11 June 2009 and responding to her letter of 20 July 2009 as her initial request for the information. In relation to point e above, the Council advised that no survey had been carried out and therefore no information was held. It also stated that the remainder of the information she had requested was being withheld as exempt in terms of section 38(1)(b) (Personal information) and 36(1) (Confidentiality) of FOISA.
4. On 3 August 2009, Mrs Wilson wrote to the Council requesting a review of its decision. She disputed the application of the exemptions claimed and questioned the Council's position in relation to point e of her request.
5. The Council notified Mrs Wilson of the outcome of its review on 4 September 2009, upholding the initial decision that any information held was properly withheld under sections 36(1) and 38(1)(b) of FOISA.
6. On 3 October 2009 Mrs Wilson wrote to the Commissioner, stating that she was dissatisfied with the Council's decision to withhold information 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 Mrs Wilson 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 2 December 2009, the Council was notified in writing that an application had been received from Mrs Wilson and was asked to provide the Commissioner with any information withheld from her. 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, 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 the course of this correspondence, the Council was asked to consider whether the information should properly have been dealt with under the EIRs, as environmental information. In this connection, it was asked to consider the application of section 39(2) of FOISA and of any exceptions in regulation 10 of the EIRs it considered relevant to the withheld information.
10. The Council accepted that the information should be dealt with as environmental information under the EIRs and confirmed that it was therefore relying upon section 39(2) of FOISA. In support of its decision to withhold information, it argued that regulations 10(5)(d) and 11 of the EIRs applied.
11. Mrs Wilson also made further submissions to the Commissioner. The relevant submissions obtained from the Council and Mrs Wilson will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

12. 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 Mrs Wilson and the Council and is satisfied that no matter of relevance has been overlooked.

Section 39(2) of FOISA – environmental information

13. The Commissioner has set out his thinking on the relationship between FOISA and the EIRs in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland* and need not repeat it in full here. In this case, the Council confirmed in the course of the investigation that it was entitled to withhold the information requested, as environmental information, under section 39(2) of FOISA. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs, which is reproduced in the Appendix below.



14. Given the subject matter of the information requested by Mrs Wilson (a dispute in relation to the existence of a right of way, in connection with the proposed creation of a coastal footpath), and having considered that information, the Commissioner takes the view that the information relates to measures or activities affecting, or be likely to affect, the elements of the environment, in particular land and landscape. Consequently, he considers that information to fall within the definition of environmental information set out in regulation 2(1) of the EIRs, in particular paragraph (c) of that definition. However, while he is pleased to note that the Council accepted this in the course of the investigation, he must also note that it did not do so (and act accordingly under the EIRs) when dealing with Mrs Wilson's information request. As he found in *Decision 218/2007*, a Scottish public authority has an obligation to deal with a request for environmental information under the EIRs: in failing to do so, he finds that the Council failed to comply with regulation 5(1) of the EIRs.
15. The exemption in section 39(2) of FOISA provides that environmental information as defined by regulation 2(1) of the EIRs is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. In this case the Commissioner accepts that the Council was correct to apply the exemption to the withheld information, given his conclusion that it is properly considered to be environmental information.
16. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that 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 the information under FOISA. The Commissioner has consequently proceeded to consider this case in what follows solely in terms of the EIRs.
17. Having accepted that the information was environmental, the Council submitted that the exception in regulation 10(5)(d) of the EIRs applied to all the withheld information, while exceptions in regulation 11 also applied to those elements which comprised personal data. The Commissioner will first of all consider regulation 10(5)(d), and only where he is not satisfied that this applies will he go on to consider the other exceptions cited by the Council.

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

18. 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.
19. 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. As indicated above, the Council submitted that all the withheld information was covered by this exception.



20. 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.
21. The Council submitted that it had a statutory duty, under section 46(1) of the Countryside (Scotland) Act 1967, to assert, protect and keep open and free from obstruction or encroachment any public right of way wholly or partly within its area, for which purposes it might institute and defend legal proceedings and generally take such steps as it deemed expedient.
22. The Council explained that, once the issue of a right of way had been raised, it was required to determine whether this was the case. The normal preliminary action in investigating the presence or otherwise of a right of way was to issue questionnaires for completion by any party who may have relevant information on the actual use of the route by the public. Once completed, the questionnaires were passed to the Council's legal service for assessment. The quality of the evidence received was critical, the Council submitted, in guiding its actions in pursuit of its statutory duty.
23. The Commissioner is satisfied that the information provided to him for the purposes of the investigation falls within the suggested definition of "proceedings " set out in paragraph 21 above, having been used by the Council for the purposes of its own internal deliberations in pursuance of its statutory duties under section 46(1) of the Countryside (Scotland) Act 1967. For the exception in regulation 10(5)(d) to apply, however, the Commissioner must be satisfied that disclosure of the information would, or would be likely to, prejudice substantially the confidentiality of those proceedings. Firstly, he must be satisfied that the proceedings are confidential, such confidentiality being provided for by law.
24. The Council confirmed that in this particular case the existence of a right of way had been disputed, resulting in the matter being subject to court action. It submitted that once that action had been instigated, it held the information for the purposes of the action and it was subject to legal professional privilege (and in particular legal advice privilege). It should be noted, however, that the Commissioner does not generally consider court proceedings to be the kind of proceedings envisaged for the purposes of regulation 10(5)(d) (see, for example, *Decision 096/2006 - Mr George Waddell and South Lanarkshire Council*): for information held for the purposes of court proceedings, the exception in regulation 10(5)(b) (which relates to the course of justice, amongst other matters) may be more relevant.



25. The Council went on to argue that a duty of confidentiality was owed to those who had completed questionnaires during the process of confirming the presence or otherwise of a right of way. While there might not be a specific statutory provision prohibiting the release of the information, it believed the common law of confidence should protect the confidentiality of the proceedings, particularly in relation to communications between the Council and those who responded to the questionnaires. The Council also argued that, given that most of the information pre-dated the enactment of FOISA by some time, it would have been assumed by all parties that consultation responses of this kind would not be made public.
26. The Council contended that if the information was disclosed, its proceedings would be substantially prejudiced. The risk of future non-cooperation in similar exercises would inhibit its ability to obtain the best quality of information about rights of way and make it more difficult to carry out its statutory duty under the Countryside (Scotland) Act 1967. In relation to its own internal communications on the matter, it also argued that these expressed free and frank views for the purposes of deciding what approach should be taken to the matter: in this connection, the Council argued that disclosure could discourage the authors from exploring all options and potentially prejudice the conduct of the Council's affairs as indicated above.
27. Mrs Wilson, on the other hand, believed that letters and questionnaires sent to the Council on this matter, including anything of a sensitive nature, would have been sent in the knowledge that they would be included in a public enquiry and therefore open to scrutiny. She was aware of no assurance from the Council that information of the kind requested would be treated in confidence.
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.
29. 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.
30. To have the necessary quality of confidence, the information should not be generally accessible. In this regard, while the Commissioner notes that some of the information was submitted in evidence for the purpose of the court action, he does not consider it to follow that it became generally accessible to the public as a result. The Commissioner therefore accepts that it all had the necessary quality of confidence.



31. As indicated above, the Commissioner is also satisfied that the information was provided to the Council in the course of, and for the purposes of, processes carried out under the Countryside (Scotland) Act 1967. Having considered the information and the context within which it was provided (including the timing, which in the case of the great majority of the information was some time before FOISA came into force), he accepts the Council's submissions that it would have been generally assumed at the time that the information would have been held in confidence. Therefore, he is satisfied in the circumstances that the second requirement set out in paragraph 29 above could be met in respect of the withheld information and that the proceedings in question could properly have been considered confidential.
32. The Commissioner is also satisfied that certain of the withheld information comprises communications in the course of which legal advice is sought from and provided by the Council's own in-house legal advisers. He accepts that this process of obtaining internal legal advice, in particular, falls within the definition of "proceedings" for the purposes of regulation 10(5)(d). The communications meet all of the requirements for legal advice privilege, itself an aspect of the common law of confidence, and the Commissioner is satisfied in the circumstances that they retain the quality of confidence. By virtue of being privileged, therefore, these communications relate to confidential proceedings of the Council.
33. As the Commissioner is satisfied that the withheld information was held for the purposes of certain confidential proceedings of the Council, that confidentiality being provided for by law, he must now go on to consider whether that confidentiality would have been prejudiced substantially, or would have been likely to be prejudiced substantially, by disclosure of the information.
34. 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. That said, given the content of the information and its confidential (and, at least to some extent, privileged) nature, and having taken account of the Council's arguments in relation to future harm to the process should disclosure have taken place, the Commissioner accepts that disclosure would have caused, or would have been likely to have caused, substantial prejudice to the confidentiality of the authority'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

35. In considering the public interest test, the Council could not identify any public interest arguments of substance in support of the information being disclosed. It pointed out that matter had been dealt with in the Sheriff Court, the applicant having had access to the papers lodged with the Court. In the circumstances, the Council did not consider it likely that Mrs Wilson's understanding of the process would be materially enhanced by disclosure of the information. On the other hand, it believed disclosure would be unwarranted as it would discourage those individuals who had submitted letters and questionnaires from doing so in future and thus make it significantly harder for the Council to carry out its statutory duty efficiently. There was therefore a compelling public interest in maintaining confidentiality.



36. In a number of previous decisions under section 36(1) of FOISA and equivalent provisions in the EIRs, the Commissioner has concluded that there will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client, bearing in mind that the courts have long recognised the strong public interest in maintaining this right on administration of justice grounds. More generally, he considers there to be a strong public interest, also recognised by the courts, in the maintenance of confidences. Consequently, while he will consider each case individually, he is likely only to order the release of privileged communications (and confidential communications generally) in highly compelling cases only.
37. The Commissioner accepts that it might on occasion be in the public interest to require disclosure of confidential material where it would make a significant contribution to debate on a matter of public interest or the scrutiny of decision making processes. In this regard, however, while noting that this is a matter in which the applicant undoubtedly has an interest, he can identify (and has been advised of) no more compelling arguments as to why it would be in the wider public interest for the information to be disclosed.
38. Given his approach to confidential information as outlined in paragraph 36 above, the Commissioner accepts the public interest arguments put forward by the Council in support of the information being withheld. It is in the public interest that reasonable expectations of confidentiality be maintained, and in particular that (where necessary) an authority can carry out its statutory processes and in that connection communicate with its legal advisers freely and frankly in confidence.
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, and therefore is satisfied that the information was properly withheld under regulation 10(5)(d) of the EIRs.
40. Given that the Commissioner has concluded that the information was properly withheld from Mrs Wilson under regulation 10(5)(d), he is not required (and does not intend) to consider the other exceptions cited by the Council.



DECISION

The Commissioner finds that Aberdeenshire Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in dealing with Mrs Wilson's request for information. In particular, in failing to identify the information requested as environmental information (as defined in regulation 2(1)) and deal with the request accordingly under the EIRs, it failed to comply with regulation 5(1) of the EIRs.

The Commissioner also finds, however, that the Council was entitled to withhold the information requested under section 39(2) of the Freedom of Information (Scotland) Act 2002 and regulation 10 (5)(d) of the EIRs. Consequently, he does not require the Council to take any action.

Appeal

Should either Mrs Wilson or Aberdeenshire 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
6 August 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....
- (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;....