Decision Notice

Decision 126/2015: Royal Society for the Protection of Birds and The Scottish Ministers

East coast windfarm projects

Reference No: 201500357
Decision Date: 6 August 2015

Scottish Information Commissioner

Summary

On 13 February 2014, the Royal Society for the Protection of Birds (the RSPB) asked the Scottish Ministers (the Ministers) for information relating to east coast windfarm projects. The Ministers refused to make the information available on the basis that the request was manifestly unreasonable because of the burden it would place on them to respond.

The Commissioner accepted that the request was manifestly unreasonable and that, as a result, the Ministers were entitled to refuse to make the information available to the RSPB.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (4)(b) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 13 February 2014, the RSPB made a request for information to the Ministers. The information requested was for all material concerning:

   - Acceptable Biological Change
   - Potential Biological Removal
   - Band Collision Risk Model; and
   - Review of conservation objectives for Special Protection Areas with seabird qualifying interest

   since June 2012, to include minutes, notes, memos, correspondence (including emails) or other unpublished information (including in electronic formats) held by the Scottish Government.

2. The Ministers contacted the RSPB on 21 February 2014, seeking clarification of the request.

3. On 26 February 2014, the RSPB wrote to the Ministers and clarified that it was only seeking information relevant to east coast wind farm projects, and that the information should be limited to birds, but should include all birds recorded, including those in flight or on water.

4. The Ministers contacted the RSPB on 25 March 2014, noting that the request had generated a large volume of information and indicating that it would take longer than the permitted 20 working days for them to be able to identify, collate and review information captured by the request. The RSPB confirmed, on 26 March 2014, that it would be acceptable to extend the time for response by an additional 20 working days.

5. On 31 March 2014, the Ministers contacted the RSPB again, asking it to confirm that its request was restricted to specific named east coast wind farms.

6. The RSPB wrote to the Ministers on 15 April 2014 and confirmed that it was only seeking information regarding the following east coast wind farm projects:

   - Beatrice Offshore Windfarm Limited
   - Moray Offshore Renewables Limited
   - Inch Cape
   - Neart na Gaoithe
   - Seagreen.

   The RSPB stated that it was not interested in any other plans or projects and it further clarified that it did not wish to see purely administrative information, personal information, repetitive information or information already in the public domain. The RSPB also noted that it would prefer the information to be provided in an electronic format.

7. Although further correspondence was exchanged between the parties, the Ministers did not respond to the RSPB's request.

8. On 4 June 2014, the RSPB wrote to the Ministers, requesting a review of their decision on the basis that they had failed to provide the information requested.

9. The Ministers notified the RSPB of the outcome of their review on 28 July 2014. The Ministers refused the request on the basis that it was formulated in too general a manner, with the result that the information was excepted from disclosure in terms of regulation 10(4)(c) of the EIRs.

10. On 1 September 2014, the RSPB made an application to the Commissioner under section 47(1) of the Freedom of Information (Scotland) Act 2002 (FOISA) and, as a result, on 18 December 2014, the Commissioner issued *Decision 261/2014 Royal Society for the Protection of Birds and the Scottish Ministers*, which required the Ministers to provide a response to the RSPB's requirement for review other than in terms of regulation 10(4)(c) of the EIRs.

11. The Ministers notified the RSPB of the outcome of the further review on 30 January 2015. The Ministers informed the RSPB that they considered the request to be manifestly unreasonable. Consequently, they applied the exception in regulation 10(4)(b) of the EIRs and refused to respond to make the information available.

12. On 23 February 2015, the RSPB wrote to the Commissioner. The RSPB applied 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 specified modifications. The RSPB stated it was dissatisfied with the outcome of the Ministers' review: it did not agree that the request was manifestly unreasonable.

Investigation

13. The application was accepted as valid. The Commissioner confirmed that the RSPB made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.

14. On 4 March 2015, the Ministers were notified in writing that the RSPB had made a valid application and the case was allocated to an investigating officer.

15. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and in particular to justify their reliance on regulation 10(4)(b).

Commissioner's analysis and findings

16. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both the RSPB and the Ministers. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

17. It is clear from the Ministers' correspondence with both the RSPB and the Commissioner that the information sought by the RSPB is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. The RSPB made no comment on the Ministers' application of the EIRs in this case and the Commissioner will consider the request in what follows solely in terms of the EIRs.

Regulation 10(4)(b) of the EIRs

18. Regulation 5(1) of the EIRs creates a duty on public authorities to make environmental information available upon request, subject to provisions which include the exceptions in regulation 10. A Scottish public authority may refuse a request to make environmental information available to the extent that the request is manifestly unreasonable (regulation 10(4)(b)). This exception can only apply where, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)). In addition, the public authority must apply a presumption in favour of disclosure (regulation 10(2)(b)) and interpret the exception restrictively (regulation 10(2)(a)).

19. There is no definition of "manifestly unreasonable" in the EIRs, or in Directive 2003/4/EC, from which they are derived. The Commissioner's opinion is that "manifestly" implies that a request should be obviously or clearly unreasonable, in which connection she notes the opinion of the Information Tribunal in *Dr Kaye Little v Information Commissioner and Welsh Assembly Government (EA/2010/0072)*[1], which considered regulation 12(4)(b) of the Environmental Information Regulations 2004:

From the ordinary meaning of the words "manifestly unreasonable", it is clear that the expression means something more than just "unreasonable". The word "manifestly" imports a quality of obviousness. What is in issue, therefore, is a request that is plainly or clearly unreasonable. It is a more stringent test than simply "unreasonable".

[1] http://www.informationtribunal.gov.uk/DBFiles/Decision/i475/[2010]UKFTT_EA20100072_(GRC)_20101230.pdf

20. Whether a request is manifestly unreasonable must depend on the facts of each case. The exception may apply where it can be demonstrated that a request is vexatious, or where compliance would incur unreasonable costs for the public authority or an unreasonable diversion of public resources.

21. In *Decision 024/2010 Mr N and the Scottish Ministers*[2], it was stated that the Commissioner was likely to take into account the same kinds of considerations in deciding whether a request was manifestly unreasonable under the EIRs as in reaching a decision as to whether a request was vexatious in terms of section 14(1) of FOISA. It does not follow, however, that a request is only manifestly unreasonable under the EIRs if it is vexatious under FOISA. In this case the focus of the Ministers' submissions to the Commissioner appears to be on the burden of compliance and its effects on those who would be required to comply. The Ministers also referred to the cost of compliance within their reasoning.

22. The Commissioner considers the following factors to be relevant to a finding that a request (which may be the latest in a series of requests or other related correspondence) is manifestly unreasonable:

- it would impose a significant burden on the public authority;
- it does not have a serious purpose or value;
- it is designed to cause disruption or annoyance to the public authority;
- it has the effect of harassing the public authority;
- it would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.[3]

23. This is not an exhaustive list and it is not necessary for all of the above criteria to be met. Other factors may be relevant, depending on the circumstances, taken with some or all of the above or separately. Some arguments may naturally fall under more than one heading. The Commissioner acknowledges the relevance of *The Aarhus Convention: An Implementation Guide*[4] (in the version applicable at the time the Ministers received this request), which states at page 57:

Although the Convention does not give direct guidance on how to define "manifestly unreasonable", it does hold it as a higher standard than the volume and complexity referred to in article 4, paragraph 2. Under that paragraph, the volume and complexity of an information request may justify an extension of the one-month time limit to two months. This implies that volume and complexity alone do not make a request "manifestly unreasonable" as envisioned in paragraph 3(b).

24. In their submissions, the Ministers maintained that the request was manifestly unreasonable. They drew attention to the Commissioner's guidance (see above), which states that unlike FOISA, there is no cost limit on complying with a request for environmental information, but there may be cases where:

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[2] http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2010/200900461.asp

[3] See the Commissioner's briefing on vexatious or repeated requests at http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Section14Overview.aspx

[4] http://www.unece.org/env/pp/acig.pdf

(i) the time and expense involved in complying with a request for environmental information means that any reasonable person would regard them as excessive; and

(ii) an extension of an additional 20 working days (possible under regulation 7) is not sufficient to make dealing with the request manageable.

25. The Ministers submitted that they did not originally treat the request as manifestly unreasonable, as their aim was to provide information wherever possible. However, they did not consider it possible to respond to the request, even with the additional 20 working days allowed by regulation 7 of the EIRs.

26. The Ministers confirmed the search terms used in seeking to identify and locate the information held, explaining why some of these caught information which was not relevant to the request. They explained that the information was held by two teams within Marine Scotland, the Marine Renewable Energy team within Marine Scotland Science (MSS) and the Marine Scotland Licensing Operation Team (MS-LOT). They explained that MS-LOT was responsible for providing advice and recommendations to Scottish Ministers on applications for consents for offshore wind developments and that, as part of this process, MSS provided advice on the impact of such developments and developed assessment methods.

27. Therefore, the Ministers explained, the majority of information on the assessment methods, the subject of this request, was held by MSS.

28. The Ministers provided details of the searches carried out, which resulted in the identification of all information that potentially fell within the scope of the request. They explained that further work was required to determine what information was actually within the scope of the request. The Ministers described the work already carried out, which they described as considerable, and which had reduced the number of potentially relevant documents to 10,000.

29. The Ministers estimated that this work took 390 hours in total. In addition, the Ministers submitted, a brief review was undertaken by specialist staff to identify any potentially sensitive information to highlight to the Scottish Government Legal Directorate. In the circumstances, the Ministers submitted that they considered it manifestly unreasonable for them to have to devote so much additional expensive staff resource, over and above the significant amount of time already spent in considering a single request.

30. The Ministers explained that, given the technical nature of the request, only a limited number of specialist scientists within Marine Scotland would be able to determine what information was within the scope of the request and dealing with the request. This would impose a very significant burden on that part of Marine Scotland and divert them from other important work, which included advising on current and forthcoming applications and post-consent work on the Moray Firth windfarms.

31. The Ministers estimated the time taken to fully respond to the request, would equate to 480 hours of staff input (25% of which would be administrative staff hours). Work done by administrative staff would be costed at £11.71 per hour, with the remaining work (requiring more senior staff) costing in excess of the £15 maximum applicable for charging under the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations). (The Fees Regulations do not apply to charging under the EIRs, but the Commissioner accepts that, in this case, it was reasonable for the Ministers to consider the

maximum staff cost under the Fees Regulations in this case.) This would give a total cost of £6,805.20 to respond to the request.

32. The Ministers noted that the RSPB asked not to see purely administrative information, personal information, repetitive information or information already in the public domain, but submitted that this did not make the request more manageable. They explained that if all this information needed to be excluded it would create significant extra work to redact as personal or administrative information often appeared within emails or documents which might contain other information that was within scope.

33. The Ministers were asked whether information relating to each of the five projects mentioned within the amended request would be accessible in isolation as this appeared to have been the case.

34. The Ministers submitted that the development or appropriate application of the tools and models included within the request had not been undertaken for these wind farms in isolation. It explained that it would not be possible to provide all relevant information on a particular tool or model if this were restricted to these farms.

35. Taking account of all of the submissions provided by the Ministers, the Commissioner notes the amount of work already undertaken by the Ministers in considering the RSPB's request. She acknowledges the time this has taken and both the burden and the cost involved.

36. The Commissioner further acknowledges that specialist staff would be required to undertake the work involved in responding to the RSPB's request. While she would not consider it reasonable to use the RSPB's exclusion of administrative and other information to complicate the process of responding (there would appear to be no basis for concluding that the requester intended this information to be excluded if that had the practical effect of making it more difficult to respond), overall she accepts the Ministers' submissions on the burden of responding as reasonable in the circumstances. She agrees that responding to this request would have a significant detrimental impact on the time of the staff involved, imposing a burden on the authority which extends beyond simple questions of cost. She is therefore satisfied that the request is manifestly unreasonable.

37. Whilst accepting that responding to the request would impose a significant burden, both in time and cost, and in the deflection of key resources from other functions, consideration must be given to the public interest test before an exception under the EIRs can be considered to apply.

Public interest test

38. In common with all the other exceptions in the EIRs, regulation 10(4)(b) is subject to the public interest test in regulation 10(1)(b). Consequently, information can be withheld under the exception only where, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

39. In their application to the Commissioner, the RSPB submitted that large off-shore windfarm projects would have a significant detrimental effect on seabird populations that contributed to the "qualifying interest" of sites in Scotland designated under the EU Birds Directive as Special Protection Areas (SPAs). Highlighting the importance of these designations on an EU-wide basis and the proximity of these particular wind farm sites to the relevant colonies and their feeding grounds, it submitted that there was a high level of public interest in maintaining the capacity of the SPAs to protect species and habitats.

40. The RSPB also submitted that these consented windfarms had been the subject of an unusual consenting process that had limited the opportunity for formal public consultation and scrutiny of the environmental impact assessments and other information considered by the decision maker. It noted that a significant amount of information was generated by the process, but that none of this was made available for public consultation. In addition to the high level of public interest in ensuring that development projects did not damage internationally important nature conservation interest, the RSPB considered it of the utmost public interest that the decision-making process was transparent and open to scrutiny.

41. The RSPB highlighted the Commissioner's guidance on consideration of the public interest in support of its position.

42. The Ministers submitted that they did not take the decision to treat the request as manifestly unreasonable lightly and viewed the exception restrictively in doing so. They explained that they tried to explain to the RSPB on a number of occasions why the request was too broad. They acknowledged that the request was narrowed somewhat, but also commented that they had explained to the RSPB why this was still not manageable. They stated that the RSPB had followed their advice and submitted two narrower requests, which were answered despite taking considerable staff time. They believed they had been as helpful as possible in the circumstances.

43. In all the circumstances, the Ministers considered the balance of the public interest to favour upholding the exception. Whilst they recognised some public interest in information about bird impact assessment methodologies in relation to the licensing of windfarms, they submitted that this was outweighed by the public interest in ensuring the efficient and effective use of public resources by not incurring excessive costs when complying with information requests.

44. Access to information under the EIRs is a right and not to be interfered with lightly. It is not the purpose of regulation 10(4)(b) of the EIRs to deter reasonable and proportionate requests from any requester. In that context, the Commissioner considers that there to be a strong public interest in protecting the integrity of the regime and ensuring that exceptions are interpreted in a restrictive manner and information disclosed wherever possible.

45. The Commissioner also acknowledges that there is a public interest in disclosure of the information, for all of the reasons submitted by the RSPB

46. On the other hand, the Commissioner accepts that it is in the public interest for Scottish public authorities to be able to carry out their functions without unwarranted disruption and diversion of resources. She has accepted that compliance with this request would impose a significant burden on the Ministers, to the extent that it would be manifestly unreasonable to expect them to do so.

47. In all the circumstances of this case, on balance, the Commissioner finds that public interest in making the requested information available is outweighed by the public interest in maintaining the regulation 10(4)(b) exception and preventing the disruption to the Ministers' functions that would inevitably result if resources were diverted to provide a response which met the full requirements of the RSPB's request.

48. Therefore, while she has not reached this conclusion lightly, the Commissioner accepts in this case that the Ministers were entitled to refuse the RSPB's request under regulation 10(4)(b) of the EIRs.

Decision

The Commissioner finds that the Scottish Ministers complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the RSPB.

Appeal

Should either the RSPB or the Scottish Ministers wish to appeal against this decision, they have the right to 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.

Rosemary Agnew
Scottish Information Commissioner

6 August 2015

Appendix 1: Relevant statutory provisions

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;

…

(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.

…

(4) A Scottish public authority may refuse to make environmental information available to the extent that

…

(b) the request for information is manifestly unreasonable;

…

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