



Scottish Information
Commissioner

Decision 081/2007 – Mr W P Whyte and Aberdeenshire Council

Information about land use tier designation

Applicant: Mr W P Whyte
Authority: Aberdeenshire Council
Case No: 200600653
Decision Date: 29 May 2007

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 081/2007 Mr W P Whyte and Aberdeenshire Council

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Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 10(1) (Time for compliance); 17(1) (Notice that information is not held).

Environmental Information (Scotland) Regulations 2004 (EIRs) regulation 2 (Interpretation).

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Whyte made a series of requests for information relating to the land tier designations applied to a certain area of land within the Clashindarroch Forest.

The Council responded by sending information to Mr Whyte over a period of several months, but he did not find that it met his needs and did not accept that the Council was not withholding information which fell within the scope of his requests.

Finally, the Council stated that it did not hold any additional information relevant to the terms of the three requests which formed the basis of Mr Whyte's application for a decision from the Scottish Information Commissioner. Following an investigation the Commissioner found that the Council had dealt with the case largely in accordance with the requirements of FOISA.



Background

1. On 24 October 2005 Mr Whyte wrote to Aberdeenshire Council (the Council) with requesting information on several points relating to a decision that he understood to have been taken during or prior to 2003, to downgrade an area of land on the edge of Clashindarroch Forest from designated Tier 3 to Tier 4 land. He asked for the information to be provided in hard copy.
2. The Council responded to Mr Whyte's request in an undated letter which Mr Whyte received on 15 November 2005. The Council supplied a number of documents which it believed would satisfy Mr Whyte's request. The Council made reference in its letter to the Clashindarroch windfarm proposal, and provided several documents relating to that proposal. It also told Mr Whyte that the Tiering Policy had not been developed in the way that he seemed to have assumed: the criteria in the tiering were generated on the basis of first principles derived from national guidance, not from detailed assessment of sites. It was not aware of any relevant changes to the criteria following their approval.
3. Mr Whyte wrote back to the Council on 4 December 2005, explaining that he was endeavouring to understand the reason for, and the procedures by which the area of the Clashindarroch Forest was designated and possibly re-designated as falling within certain tiers. He asked for an explanation of the criteria referred to in the Council's response to his initial request, and of the procedures by which the criteria were applied to individual areas of land. He also asked for "all documents and papers relating to tiering designations of land within the Clashindarroch Forest" and specified that these should include "folders; correspondence; facsimile messages; e-mails; notes of telephone conversations; briefing papers; discussion papers; minutes of meetings; personal notes of meetings; and all plans and maps of the relevant area prepared during the decision making process and subsequently, in whatsoever form the various documents may be held."
4. The Council treated this letter as a new request for information, acknowledging its receipt on 7 December 2005.
5. On 29 December 2005 Mr Whyte wrote again to the Council in relation to the information which he had received on 15 November. He pointed out inadequacies which made it difficult to obtain the information he needed from the land use tiering map supplied and asked for these deficiencies to be rectified and a more legible and comprehensible version to be provided.



6. Having received no response to his letters of 4 December and 29 December, Mr Whyte wrote to the Council on 2 February 2006, reminding the Council that more than 20 working days had elapsed. He pointed out that the information was urgently required to help prepare a submission for the forthcoming Public Local Inquiry into the Clashindarroch proposal. A similar letter was sent to the Council's Principal Committee Officer, in which he asked for the matter to be considered by the Council's review panel.
7. A letter of apology was sent to Mr Whyte by the Chief Executive of the Council on 3 February 2006. This was followed by two letters dated 7 February 2006, one from the Clerk to the Review Panel acknowledging Mr Whyte's request for a review, and one from the Chief Executive. The Chief Executive's letter explained that a response had been sent to Mr Whyte on 3 February 2006, but that it was believed that his initial query had been answered in full by the first letter sent to him. Mr Whyte was also told that Council officers had offered to show and explain to him the information held on the Council's GIS system, which did not lend itself to being copied in printed format.
8. In another undated letter (received by Mr Whyte on 13 February 2006) one of the Council's planning officers sent a copy of a letter from the North East Scotland Biological Records Centre (NESBREC) which set out biological data to accompany the map of the tiered designations covering the Clashindarroch Forest, as sent to Mr Whyte on 3 February 2006. The letter stated that the Council believed that this information would satisfy Mr Whyte's request.
9. Mr Whyte wrote back on 16 February disputing that the information provided was of assistance to him. He raised several questions relating to the detail of the information provided, and also asked for some additional information to be provided.
10. Mr Whyte wrote a second letter to the Council on 16 February 2006, addressed to the Senior Solicitor. This letter set out his submission to the review panel.
11. Mr Whyte also wrote to the Chief Executive of the Council on 17 February 2006. In his letter he acknowledged that he was now corresponding with the Council on three separate fronts in connection with his requests, and indicated that he would leave the matter with the review panel.



12. On 2 March 2006 the Council wrote to advise Mr Whyte that the review panel had found that no further information required to be forwarded to him in respect of his request. The review panel had acknowledged the complexity of the designation process and decided that Mr Whyte should be provided with a simple chronology of the process leading to the tiering designation, particularly in terms of its effect upon the Clashindarroch Forest. The review panel also acknowledged that some of the information held by the Council was not suitable for providing in printed format, but would be more easily understandable when viewed on a computer. The panel asked the Planning Service to give Mr Whyte access to the information in this way as soon as possible so that any representation he wished to make to the forthcoming planning inquiry was not prejudiced.
13. Mr Whyte was not satisfied with the Review Panel's response and wrote to the Council asking for the decision to be reconsidered. The Council noted his disappointment but advised him that there was no scope for any further consideration of his request for a review within the Council's procedure. The Council again invited Mr Whyte to visit the Planning Service to view the information held electronically on its GIS system which did not lend itself to reproduction in paper-based format. Mr Whyte wrote back on 24 March 2006, again expressing dissatisfaction with the Review Panel's decision.
14. On 27 March 2006 Mr Whyte applied to me for a decision on the matter. In his application he summarised the extensive correspondence that he had had with the Council in relation to his information requests, and expressed his belief that the Council held information relating to his requests which had not been provided to him.
15. The case was allocated to an investigating officer and the application validated by establishing that Mr Whyte had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to his request.

Investigation

16. The Council was contacted on 4 April 2006, and invited to comment on the matters raised by Mr Whyte and on his application as a whole, in terms of section 49(3)(a) of FOISA. In particular, the Council was asked to comment on the assertion that it held information relevant to Mr Whyte's requests which had not been provided to him. The Council was also asked for details of the searches carried out to establish what information relating to Mr Whyte's request was held.



17. The Council replied on 21 April 2006, providing comments in relation to the points raised by the investigating officer.
18. On 20 April 2006, the Council sent Mr Whyte some additional documents, which were intended to provide him with a chronology of the process leading to the tiering designation, particularly in terms of its effect upon the Clashindarroch Forest. The documents related to the Aberdeen and Aberdeenshire Structure Plan.
19. Mr Whyte wrote to my Office on 25 April 2006 with regard to the documents sent to him. He stated that he had not found any reference to the Clashindarroch Forest in any of the documents, and that they did not provide him with the information he had requested or further his understanding of the processes by which the Clashindarroch Forest had been designated for Land Use purposes.
20. The Council was asked to provide copies of the information sent to Mr Whyte on 20 April 2006, and these were duly provided to the investigating officer.
21. After examining all the correspondence relating to the case, it appeared to the investigating officer that the Council's review panel had focused on the Council's response to Mr Whyte's first request (24 October 2005) and had rather overlooked his two subsequent requests of 4 and 29 December 2005. The Council was invited to consider whether it held any information relating to those requests which had not already been supplied to Mr Whyte.
22. The Council instructed a member of staff not previously involved with Mr Whyte's requests to examine the information held in its archived files, and some additional information was retrieved. The Council acknowledged that in some cases the documents did no more than mention the tiered policy, but it sent them to Mr Whyte for the sake of completeness.
23. The Council stated that it was now confident that it had now retrieved all information held by the Council on the Aberdeen and Aberdeenshire Structure Plan tiered policy entitled "Policy 26 – 4 Tier Policy Areas for Minerals, Landfill, Landraise and Windfarm Proposals".
24. The investigating officer wrote to Mr Whyte on 15 November 2006 to advise him that it seemed unlikely that any further enquiries to the Council would result in the discovery of more information relating to his requests. As it seemed likely that Mr Whyte had now received all information relating to his request, he was invited to withdraw his application for a decision.



25. Mr Whyte replied on 9 December 2006. He asked for the investigation to continue. He did not agree that the Council had now carried out a thorough search, or that it had taken any real action to resolve the matter, other than to carry out a re-examination of the few files previously acknowledged, which he considered to be largely irrelevant.
26. Mr Whyte raised the question of the extent to which specialists had been consulted by the Council over areas of special interest (SPAs, SACs, SSSIs and similar areas of lesser significance). He also asked about the extent of consultation over the process of identifying land for inclusion as Tier Designated sites. In both cases he considered that it would be reasonable to assume that the process of consultation would have generated a substantial paper trail, including minutes, reports, correspondence and emails. He also believed that the process of implementing the Tier Designation system would have resulted in hundreds of documents, some of which would be relevant to the Clashindarroch Forest.
27. Mr Whyte also made reference to a handwritten note included in the information provided by the Council. He believed that the author and the three individuals identified by first name only in the document might also have retained documentary records relevant to his request.
28. The Council was asked to comment on the matters raised by Mr Whyte (letter of 13 December 2006) and replied on 5 January 2007.
29. The Council took the view that Mr Whyte's letter of 9 December 2006 indicated that the nature of his information request had changed significantly from the original request made on 24 October 2005. The Council stated that in his original request, Mr Whyte had asked for information on four specific points related to the development of the Land Use Tiering Policy, all of which were related to alleged changes made to the implementation of the policy. He now seemed to the Council to be asking for information on the way that environmental data was obtained and taken into account in arriving at a decision on a specific planning application.
30. The Council acknowledged that, among the information it held, there was considerable and diverse information stemming from consultations on the wide range of environmental designations referred to in the Policy 26 "Four Tier" Policy. However, the Council considered that it was questionable whether this information was relevant to Mr Whyte's original request, as clarified in his subsequent letter of 4 December 2005, where he had stated "my request was linked to the specific events leading to the tiering designations of the area". The Council considered that it had been made clear to Mr Whyte that Policy 26 was a reflection of information from elsewhere, and that this information was not queried or analysed during the process of policy development.



31. The Council therefore took the view that the additional information it held was not relevant to Mr Whyte's original request. The Council stated that it would be happy to provide this information to Mr Whyte under the Environmental Information Regulations 2004 (the EIRs) at cost.
32. The Council commented that the handwritten note referred to by Mr Whyte (see paragraph 27 above) was a note of an internal meeting held to discuss the planning application and did not relate to the Tiering Policy and its application. The Council explained that the application of the Tiering Policy and the identification of which tier a proposal fitted into was a decision made by the Case Officer, and all documentation relating to this decision had been provided to Mr Whyte in response to his original request.
33. Finally, the Council stated that it had provided Mr Whyte with the specific information it held in relation to the evolution of the Land Use Tiering Designation System, and its application to the Clashindarroch windfarm application. If Mr Whyte was now asking for general information about the implementation of the policy, the Council considered this to be a new information request. The Council commented that correspondence relating to implementation of the policy would be scattered through many hundreds of individual planning application files. It would be likely to respond to such a request by citing Section 12 of FOISA (Excessive cost of compliance).

The Commissioner's Analysis and Findings

34. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Whyte and the Council and I am satisfied that no matter of relevance has been overlooked.
35. The main question to consider in this case is whether the Council has complied fully with Part 1 of FOISA and, in particular, section 1(1) which states that "A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority."
36. In its submissions to my Office, the Council has stated that it does not seek to withhold any information from Mr Whyte. Mr Whyte, on the other hand, believes that the quantity of documents provided by the Council falls very far short of what should be held and should have been disclosed.



Mr Whyte's first request

37. As noted in paragraph 1, on 24 October 2005 Mr Whyte asked for information on several points relating to a decision that he understood to have been taken during or prior to 2003, to downgrade an area of land on the edge of Clashindarroch Forest from designated Tier 3 to Tier 4 land. The Council advised Mr Whyte that no such decision had been taken, explaining that the approach adopted in relation to Tiering Policy had not included consideration of any specific sites in Aberdeenshire. The Council was unaware of any change to the criteria for the tiering since the tiers were first approved in the Aberdeen and Aberdeenshire Structure Plan (2001-2015).
38. The Council's review panel later confirmed to Mr Whyte that it appeared that the Tier 3 designation had never been altered for the area of land he was concerned about, although a report to the Marr Area Committee of 16 December 2003 had made a reference to the application site for the Clashindarroch windfarm as having a Tier 4 designation. In his application to me Mr Whyte was prepared to accept that his original premise regarding changes to the tiering may have been incorrect.
39. In reviewing its response to Mr Whyte's requests, the Council noted that as no changes had been made to the designation of the land, there was no relevant information to provide. In this, the Council departed from its initial response to Mr Whyte (undated letter received by him on 15 November 2005) which stated: "We confirm that the Council holds the following information, which we believe satisfies your request" before going on to explain that his request was based on a false assumption.
40. In terms of section 1(1) of FOISA, I accept that the Council did not hold the information initially requested by Mr Whyte, as his request was based on a misconception. As the Council has pointed out, any change to the tiering of the Structure Plan would have been the result of a formal, statutory process (i.e. a modification to the Plan); Council staff knew that no such change had taken place and accordingly did not search for information relating to such a change. I accept that this was reasonable in the circumstances.
41. I would comment that although I believe the initial reply to Mr Whyte was intended to be helpful, the information sent to him did not relate closely to his specific request. In terms of responding to his request under FOISA, it might have been more appropriate to inform Mr Whyte that the specific information he requested was not held (as required by section 17 of FOISA), and then to explain why his request was based on a false assumption.

Mr Whyte's second and third requests

42. Mr Whyte's second and third requests are described above, in paragraphs 3 and 5 of this Decision Notice.



43. When reviewing its response to Mr Whyte's requests, the Council again appears to have considered how best to help Mr Whyte understand the complex designation process rather than addressing the specific information requests in his letters. The review panel decided that Mr Whyte should be provided with a chronology of the process leading to the tiering designation, and that he should be invited to visit the Planning Service to see the tiering information held in electronic format, which was not easily presented in paper format.
44. Again, it seems clear that this approach was taken with the best of intentions, and that the Council made considerable efforts to provide Mr Whyte with information which would (from its point of view) explain the process at the heart of his information requests. However, Mr Whyte still finds himself unsatisfied by the information provided by the Council. The question for me to consider is whether or to what extent the Council's response to Mr Whyte's requests complied with the requirements of FOISA.
45. Mr Whyte's second request (4 December 2005) was framed in very general terms which could be capable of a broad interpretation: "all documents and papers relating to tiering designations of land within the Clashindarroch Forest". However, in his letter he provided some additional clarification: "...my request for information was limited to the specific events leading to the tiering designations of the area, and as I understood it, to the subsequent re-designation of the tiering category of the Clashindarroch Forest, or parts of it during or prior to 2003." He went on to explain "Specifically I am endeavouring to understand the reason for, the rationale and the procedures by which the area of the Clashindarroch Forest was designated and possibly re-designated."
46. When Mr Whyte wrote to the Council to request a review of its response (2 February 2006) he described his request of 4 December 2005 as "reiterating my request for the relevant information outlined in my original letter". I understand this to show that he sought information which would explain why land in the Clashindarroch Forest had been given a particular tiering designation and the process by which that had happened.
47. In his letter to my Office of 9 December 2006, Mr Whyte expressed the view that the practical implementation of the tier designation system would have resulted in the creation of scores if not hundreds of documents, some of which at least would be relevant to the Clashindarroch Forest. However, I consider that information about the practical implementation of the tier designation system falls outside the scope of Mr Whyte's information request of 4 December 2005, which focused on the reasons for a particular area of land being given a certain tier designation and the process by which that designation took place.



48. Similarly, Mr Whyte expressed the belief that in properly considering the windfarm application and its impact on the various designated areas within the Forest, further substantial numbers of documents would have been produced. However, in his letter of 4 December 2005 he stated:

“I appreciate that it is fairly obvious that my request for information relates to the current proposal...to develop part of the Clashindarroch Forest as a windfarm. However my request for information was limited to the specific events leading to the tiering designations of the area...”

49. It seems to me that Mr Whyte’s information request has developed into something wider in scope than he originally stated in his letters of 24 October 2005 and 4 December 2005.
50. I note that Mr Whyte has had an ongoing correspondence with the Council and has continued to raise additional points and make additional information requests in the period between the submission of his third information request (29 December 2005) and the present date. It is not unlikely that a person seeking information about a matter may find that their enquiries take them down paths unforeseen when they made their first request for information. Often a response to a request will raise more questions and require further information to be supplied. However, in this decision notice I can only deal with Mr Whyte’s first three information requests, as the others have not been through the process of review required by FOISA, and it is important for me to distinguish between the terms of Mr Whyte’s second request and any information requirements which may have developed in the intervening period.
51. In this case I have concluded that although it was open to the Council to interpret Mr Whyte’s second request in the broadest possible terms, the fact that the Council placed a narrower interpretation upon the scope of his request was not unreasonable. I might criticise the Council for providing Mr Whyte with a large amount of information which did not relate closely to his request (he found only 4 of the 30 documents supplied to be relevant) but I believe that the correspondence between Council officers and Mr Whyte demonstrates that Council officials were genuinely attempting to answer his questions, both by providing copies of documents and by providing explanations of various points he raised in his letters.



52. In relation to Mr Whyte's third request, outlined in paragraph 5 above, I found that although this matter was not specifically addressed in the Review Panel's response, the Panel had confirmed that it was difficult to convey information relating to the tiering process in paper format and that Mr Whyte was invited to attend the Council's offices to see the tiering information held in electronic format. I note that during the investigation of Mr Whyte's application to me the Council was asked to reconsider whether it held any other information that should be supplied in relation to this request (see paragraph 21 above). I am satisfied that the searches conducted by the Council at that time were adequate but retrieved no additional relevant information. I have therefore accepted that the Council has provided all the information it held which was capable of being copied on paper, and has offered access to additional information which is held in a format which does not permit reproduction on paper.
53. It is unfortunate that so much effort has been expended without achieving satisfaction for the person requesting information, a situation which is frustrating for both parties involved. As noted above, the Council has invited Mr Whyte to visit its offices to view information held electronically where it was not possible to reproduce this in paper format. I would suggest that if such a visit was arranged, it might be productive for Mr Whyte to discuss his information needs with a member of staff who has a good understanding of the Council's records, so that further information requests might be phrased in a way which fully represents his requirements and which reflects the information available within the Council.

Failure to comply with technical aspects of FOISA

54. I note that the Council failed to respond to Mr Whyte's requests of 4 and 29 December 2005 within the twenty working days required by section 10(1) of FOISA. The Council apologised to Mr Whyte on 3 February 2006, acknowledging that the delay in responding to his letters was unacceptable in terms of the requirements of FOISA.
55. I do not require the Council to take any further remedial action in respect of this failure to comply with section 10(1) of FOISA.



FOISA or EIRs?

56. Because the Council did not seek to withhold information on the grounds that it was exempt from disclosure, the question of whether Mr Whyte's requests should be dealt with under FOISA or under the Environmental Information (Scotland) Regulations 2004 (the EIRs) was never raised while the Council was dealing with his request. However, I believe it may be useful to include some discussion of the matter in this Decision Notice in case Mr Whyte submits further information requests to the Council. If the Council were to consider charging Mr Whyte for any information requested in future, for example, it would be important to be clear whether his requests should be dealt with under the EIRs or FOISA, as different charging regimes apply.
57. The Council has commented that when Mr Whyte's initial request was received, it was believed that he was not seeking environmental information (as defined in regulation 2(1) of the EIRs) but information on the process of policy development and change. His request was therefore dealt with under FOISA rather than the EIRs. I accept that in placing this interpretation upon Mr Whyte's request, the Council was correct to deal with his request under FOISA.
58. I note however that, in subsequent correspondence with the Council, Mr Whyte asked for information which would clearly fall within the definition of environmental information (for instance, in his letter of 16 February 2006 he asked for information about the presence of any 'Priority habitats and species' as defined in Annex 1 of the Habitats Directive). Although this particular request is not considered in this Decision Notice, I refer to it as an indication of the type of information request which should be dealt with under the EIRs rather than FOISA.

Decision

I find that Aberdeenshire Council (the Council) generally complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in dealing with Mr Whyte's information requests of 24 October 2005, 4 December 2005 and 29 December 2005.

I find that the Council failed to comply with section 10(1) of FOISA in relation to Mr Whyte's requests of 4 December 2005 and 29 December 2005, and thereby failed to comply with Part 1 of FOISA.

I do not require the Council to take any further action in respect of this decision.



Appeal

Should either Mr Whyte or Aberdeenshire Council wish to appeal the 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 of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
29 May 2007



APPENDIX

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002:

1 General entitlement

- (1) A person who request information from a Scottish public authority which holds is it entitled to be given it by the authority.

10 Time for compliance

- (1)... a Scottish public authority receiving a request for which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after –

- (a) ... the receipt by the authority of the request.

17 Notice that information is not held

- (1) Where

- (a) a Scottish public authority receives a request which would require it either-

- (i) to comply with section 1(1); or
(ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

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

The Environmental Information (Scotland) Regulations 2004

Interpretation

- 2 (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);