

Decision Notice



Decision 016/2009 Jackie Baillie MSP and the Scottish Ministers

Correspondence relating to tourism development at Aviemore

Reference No: 200801262

Decision Date: 18 February 2009

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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



Summary

Ms Baillie requested from the Scottish Ministers (the Ministers) an un-redacted copy of an email relating to a development at Aviemore. The Ministers responded by withholding the information requested under section 30(b) of FOISA. Following a review, the Ministers decided to apply section 39(2) of FOISA on the basis that the redacted information was environmental information for the purposes of the EIRs and withhold the information under regulation 10(4)(e) of the EIRs as an internal communication. Ms Baillie remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had dealt with Ms Baillie's request for information in accordance with Part 1 of FOISA and the EIRs, by withholding the information as an internal communication under regulation 10(4)(e) of the EIRs. The Commissioner 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) (Interpretation – definition of environmental information); 5(1) and (2)(b) (Duty to make available environmental information on request) and 10(1), (2) and (4)(e) (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. As part of a previous information request, a number of documents were disclosed to Ms Baillie. Within this release of information was an email (dated 7 December 2007) relating to a tourist development at Aviemore. This email was supplied to Ms Baillie with one sentence redacted. On 29 April 2008, Ms Baillie wrote to the Ministers requesting an un-redacted copy of this email.



2. The Ministers responded to Ms Baillie on 30 May 2008, confirming that since the email (less the redactions) was now in the public domain, it would deal with her request for the remaining sentence as a new request under FOISA. The Ministers went on to confirm their decision to withhold the redacted information on the basis of section 30(b) of FOISA.
3. On 10 June 2008, Ms Baillie wrote to the Ministers requesting a review of their decision. In particular, Ms Baillie put forward public interest arguments in support of her view that the redacted information should be disclosed.
4. The Ministers notified Ms Baillie of the outcome of their review on 7 July 2008. In their response the Ministers confirmed that on further consideration of the information requested, they now believed that the request should have been dealt with under the EIRs rather than under FOISA. In concluding this, the Ministers applied the exemption under section 39(2) of FOISA. Having done this the Ministers considered the request in terms of the EIRs only and concluded that the information requested was exempt from release in terms of regulation 10(4)(e), which relates to internal communications.
5. On 27 August 2008 Ms Baillie wrote to the Commissioner's Office, stating that she was 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 Ms Baillie 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 26 September 2008, the Ministers were notified in writing that an application had been received from Ms Baillie and asked to provide the Commissioner with any information withheld from the applicant. 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, the Ministers were asked to justify their reliance on regulation 10(4)(e) of the EIRs and to provide detailed arguments in support of their application of the public interest test under regulation 10(1)(b).
9. The Ministers responded with an explanation as to why they wished to rely on regulation 10(4)(e) and provided additional arguments to support their view that on balance the public interest did not favour disclosure of the information requested. These arguments are discussed in more detail in the Commissioner's analysis and findings below.



Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has consider all of the withheld information and the submissions made to him by both Ms Baillie and the Ministers and is satisfied that no matter of relevance has been overlooked.

Is the information in question environmental in terms of the EIRs?

11. Although the request was initially dealt with under FOISA, in carrying out their review the Ministers concluded that the request was for environmental information as defined in regulation 2(1) of the EIRs. Given that the information in question is contained in a communication from the Chief Planner in the Planning Directorate of the Scottish Government which concerns a planning application and specifically the construction of an access road and questions of flooding and road safety, the Commissioner is satisfied that the Ministers were correct to do so. Of particular relevance are paragraphs (a) (as it relates to the state of the elements of the environment, including landscape), (c) (as it relates to measures affecting or likely to affect these elements) and (f) (as it relates to the state of human health and safety) of the definition.

Section 39(2) of FOISA – environmental information

12. Essentially, the exemption in section 39(2) of FOISA provides that environmental information as defined by regulation 2(1) of the EIRs is exempt information for the purposes of FOISA (thereby allowing any such information to be considered solely in terms of the EIRs), subject to the public interest test in section 2(1)(b) of FOISA. As indicated in the previous paragraph, the Commissioner is satisfied that the Ministers were correct to treat the information withheld from Ms Baillie as environmental information. In this case, as there is a separate statutory right of access to environmental information available to the applicant, the Commissioner is of the view that the public interest in maintaining the exemption under section 39(2) and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA.

Application of regulation 10(4)(e) – internal communications

13. Under regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available “internal communications”.
14. As with all of the exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be released unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).



Can the information in question be considered an internal communication?

15. For information to fall within the scope of the exception, it need only be established that the information is an internal communication. If the Commissioner decides that a document is an internal communication, he is then required to go on to consider the public interest test.
16. Having considered the withheld information, which forms part of an internal email relating to a planning application and distributed among various individuals within the Scottish Administration, the Commissioner is satisfied that the information falls within the definition of internal communications for the purposes of regulation 10(4)(e) of the EIRs.

Public interest test

17. Having found the information withheld in this case to be exempt in terms of regulation 10(4)(e), the Commissioner is required to consider the public interest test contained in regulation 10(1)(b) of the EIRs as it applies to the information in question. The test specifies that a public authority may only withhold 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.
18. In her application to the Commissioner, Ms Baillie set out her views on the public interest and why consideration of this matter should lead to the release of the document in full. Ms Baillie argued that given the substantial public interest in the determination of the planning application for the development in Aviemore and the degree of public controversy surrounding that determination, including the allegation of political interference in the process, it was necessary in the interests of open government and transparency of decision making, that the Scottish Government provide full disclosure of all the contents of the communication.
19. In their submissions, the Ministers acknowledged the public interest in respect to the Aviemore development in question, but went on to outline a number of arguments in support of their view that the public interest lay “firmly in non-disclosure” of the specific sentence in question.
20. The Ministers submitted that it was clear that the sentence in question, expressing the “freely voiced opinion” of an official, had not been written in anticipation of its being placed in the public domain, referring to its content and the context within which it had arisen. They went on to argue that it was in the public interest, that officials were able to express often candid opinions in a “private space environment” without fear of disclosure. They concluded that the prospect of release of such comments would result in officials not communicating as freely and openly as might be required.
21. The Ministers acknowledged a general public interest in favour of release of the information, but asserted that they had met this by previously releasing all but the one sentence contained within the email in question, adding that release of the sentence in question would not add anything to public debate in respect of the development at Aviemore. They considered the perceived detrimental effects outlined above to outweigh any public interest in disclosure of this one sentence.



22. The Commissioner has considered fully the submissions on the public interest made by both the Ministers and Ms Baillie, taking into consideration the content of the sentence withheld, the content of the rest of the email already within the public domain and the wider context.
23. The Commissioner recognises that the information in question relates to a planning matter of public interest which has occasioned some controversy, resulting in the release of all but the one sentence (the content of which is the focus of this investigation) into the public domain.
24. Having considered the content of the withheld information, the Commissioner notes that the sentence in question reflects a candid summation of opinion on a sensitive issue made by the Chief Planner in the Scottish Government Planning Directorate to various officials and Ministers. He also acknowledges that it relates to information obtained in circumstances where confidentiality could reasonably be expected. Although the Commissioner accepts that there is a public interest in being aware of the role of the Chief Planner in this planning issue, it is also his view that the public interest in disclosure of the sentence would not outweigh the public interest in withholding the information. as he accepts that its disclosure might reasonably be expected to substantially inhibit future discussions of a similar nature.
25. It is also the Commissioner's view that in this particular case the public interest has been met substantially by the previous release of the remainder of the email in question, and that the public interest benefit from the release of the remaining sentence is low.
26. Having considered the relevant arguments in relation to the withheld information, therefore, the Commissioner has concluded that in all the circumstances, the public interest in making this information available is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs.

DECISION

The Commissioner finds that the Scottish Ministers acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Ms Baillie.



Appeal

Should either Ms Baillie or the Scottish Ministers to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
18 February 2009



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;
- ...
- (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

...

- (e) the request involves making available internal communications.

...