

Decision Notice



Decision 032/2010 Mr Alex McLaren and Fife Council

Development proposal

Reference No: 200901456
Decision Date: 2 March 2010

www.itspublicknowledge.info

Kevin Dunion
Scottish Information Commissioner

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



Summary

Mr McLaren requested from Fife Council (the Council) information relating to meetings between a specified developer or its representatives and the Council regarding proposals to develop certain land at Dunfermline. The Council responded by providing Mr McLaren with information it claimed to be all it held within the scope of his request. Following a review, Mr McLaren remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mr McLaren's request for information in accordance with the EIRs, by providing all the relevant information it held and advising the applicant to that effect, and therefore he did not require the Council 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); 39(2) (health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) and (2) (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (4)(a) (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 27 June 2009, Mr McLaren wrote to Fife Council requesting the following information:
"... copies of all the correspondence and minutes of meetings between I & H Brown (or parties acting on behalf of I & H Brown) and Fife Council, regarding proposals to develop land at East & West Baldrige Farms, Dunfermline."
2. The Council responded on 9 July 2009, enclosing what it stated to be the information Mr McLaren had requested.



3. On 14 July 2009, Mr McLaren wrote to the Council requesting a review of its decision. In particular, Mr McLaren drew the Council's attention to his belief that an inadequate search for information had been carried out, resulting in relevant documents not being provided. Mr McLaren also suggested that documents, particularly emails from Fife Council, had not been included when it should have been relatively easy to provide them. In highlighting these perceived omissions, Mr McLaren provided some examples for the Council to consider, where he understood from the information which had been provided that certain other documents should exist and be held by the Council.
4. The Council notified Mr McLaren of the outcome of its review on 10 August 2009, confirming that it had provided all the information it held which fell within the scope of his request.
5. On 10 August 2009, Mr McLaren wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's 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 Mr McLaren 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. The case was then allocated to an investigating officer.

Investigation

7. The investigating officer wrote to the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA).
8. In seeking comments from the Council the investigating officer asked the Council to justify its assertion that it had provided Mr McLaren with all the information it held relevant to his request. The Council was also asked to provide details of the searches it had carried out to determine this.
9. The investigating officer also pointed out that having considered the nature of the information requested in this case, it appeared likely that any information falling within the scope of the request would be environmental information and therefore subject to the EIRs. The Council was asked to comment on this point and provide submissions as to whether it considered the requested information fell within the scope of any of the exceptions contained in the EIRs. The Council was also asked if it wished to rely on section 39(2) of FOISA, which allows Scottish public authorities to exempt information from disclosure under FOISA if it is environmental information which the authority is obliged to make available to the public in accordance with the EIRs.



10. In its response, the Council provided an overview of the searches it had undertaken to establish what information it held with respect to Mr McLaren's request. Following further communications with the investigating officer, the Council decided to accept that Mr McLaren's request was indeed for environmental information. It cited the exemption in 39(2) of FOISA and applied the exception contained in regulation 10(4)(a) of the EIRs, on the basis that it did not hold any additional information pertinent to Mr McLaren's request.
11. During the course of the investigation, the Council provided the investigation officer with copies of the information which had been released to Mr McLaren in response to his request.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mr McLaren and the Council and is satisfied that no matter of relevance has been overlooked.

FOISA or the EIRs?

13. In the Commissioner's *Decision 218/2007 Professor A D Hawkins and Transport Scotland*, he considered the relationship between FOISA and the EIRs at some length and set out his understanding of the situation. Broadly, the Commissioner's general position on the interaction between the two regimes is as follows:
 - a. The definition of what constitutes environmental information should not be viewed narrowly
 - b. There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs
 - c. Any request for environmental information therefore must be dealt with under the EIRs
 - d. In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2)
 - e. If the authority does not choose to claim the section 39(2) exemption it must deal with the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these)
 - f. The Commissioner is entitled (and indeed obliged) where he considers a request for environmental information has not been dealt with under the EIRs to consider how it should have been dealt with under that regime.



14. Environmental information is defined in regulation 2(1) of the EIRs and this definition is reproduced in full in the Appendix to this decision. Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to the exceptions contained within regulation 10, the provisions of regulation 11 and certain other restrictions set out in the EIRs.
15. In this case, the Commissioner takes the view that the information requested (that contained in correspondence and minutes relating to a substantial proposal to develop land) is environmental in that the proposed development would be a measure affecting or likely to affect the elements of the environment, principally land and landscape. He therefore considers any information falling within the scope of the request, including any held by the Council but not provided to Mr McLaren in response to his request, would fall within the definition of environmental information as contained in regulation 2(1) of the EIRs, particularly paragraph (c) of that definition.

Section 39(2) of FOISA

16. As previously noted, the Council decided to claim the exemption in section 39(2) of FOISA on accepting that the information requested was environmental information as defined in regulation 2(1) of the EIRs. As the Commissioner also considers the information requested by Mr McLaren to be environmental information, he also therefore considers that the Council was correct in its application of section 39(2) of FOISA.
17. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner's view is that in this case, as there is a separate statutory right of access to environmental information available to Mr McLaren, the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of information under FOISA. In what follows, the Commissioner has therefore made his decision solely in terms of the EIRs.

Does the Council hold any additional information to that already provided to Mr McLaren?

18. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received.
19. In its initial response to Mr McLaren, the Council stated that it was providing Mr McLaren with the information he had requested. In its subsequent response to Mr McLaren's request for review, the Council maintained its position that it had provided him with all the information it held which fell within the scope of his request.
20. In its submissions to the Commissioner, the Council explained that in considering whether any additional information was held, searches relating to both electronic and manual sources were carried out.



21. With respect to electronic sources the Council asserted that all files and communication relating to the Dunfermline Land Allocation had been searched. In relation to manual sources, the Council submitted that all paper files and documents/representations submitted by developers were considered, along with all files held by the Local & Community Policy Team (Local Plan), which on the project in question dated back to 2003. In addition, the Strategy & Corporate Policy Team (Structure Plan) had been asked if any additional information was held there. Finally, the Council asserted that all personal notes/notebooks had been checked for staff involved in the project.
22. In writing to the Council on this matter, the investigating officer had drawn to the Council's attention the comments made by Mr McLaren in his request for review regarding the potential existence of additional information. The Council responded by providing speculative explanations as to why the information alluded to by Mr McLaren was not held, while confirming that it had been unable to trace any additional information.
23. In his application to the Commissioner, Mr McLaren expressed his view that it would be reasonable to expect there to be more information held by the Council with respect to a development of this magnitude and that if additional information was not held then this would appear to indicate significant failings in the Council's records management system.
24. Having considered the Council's submissions and the steps taken by it in order to ascertain whether it held additional information, the Commissioner is satisfied that no additional information falling within the scope of Mr McLaren's request was held by the Council at the time the request was received. The Commissioner would emphasise, however, that in coming to this decision, he appreciates Mr McLaren's concern that more information should be held by the Council in this context, and indeed has taken his arguments in this connection into account in assessing the Council's submissions. Ultimately, however, he can only consider what relevant recorded information *is* held by an authority and cannot speculate on what it should (but does not) hold.
25. Consequently, the Commissioner is satisfied that the information is subject to the exception in regulation 10(4)(a) of the EIRs.

Public Interest Test

26. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs. Therefore, a public authority may only refuse to make available information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception. In this case, the Commissioner is satisfied that no additional information was actually held by the Council at the time Mr McLaren's request was received. Consequently he does not consider there to be any conceivable public interest in requiring that any information be made available.
27. The Commissioner therefore concludes that, in all the circumstances of this case, the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs. Consequently, he is satisfied that the Council was entitled to refuse Mr McLaren's request under regulation 10(4)(a) of the EIRs.



DECISION

The Commissioner finds that Fife Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr McLaren.

Appeal

Should either Mr McLaren or Fife 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.

Kevin Dunion
Scottish Information Commissioner
2 March 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);

...

- (2) For the purpose of these Regulations, environmental information is held by a Scottish public authority if it is-
 - (a) in its possession and it has been produced or received by that authority; or
 - (b) held by another person on that authority's behalf,

and, in either case, it has not been supplied by a Minister of the Crown or department of the Government of the United Kingdom and held in confidence.

...



5 Duty to make available environmental information on request

- (1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.
- (2) The duty under paragraph (1)-
...
(b) is subject to regulations 6 to 12.

...

10 Exceptions from duty to make environmental information available–

- (1) A Scottish public authority may refuse a request to make environmental information available if-
 - (a) there is an exception to disclosure under paragraphs (4) or (5); and
 - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
 - (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure
- ...
- (4) A Scottish public authority may refuse to make environmental information available to the extent that
 - (a) it does not hold that information when an applicant's request is received;

...

