

Decision Notice



Decision 071/2011 Mr Craig Mitchell and Fife Council

Information relating to the lease of a site at Whitworth Road, Glenrothes

Reference No: 201001561
Decision Date: 6 April 2011

www.itspublicknowledge.info

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Summary

Mr Mitchell requested from Fife Council (the Council) information relating to the lease of a site at Whitworth Road, Glenrothes by Intelligent Energy (Europe) Ltd. (IE). The Council responded by providing some information to Mr Mitchell whilst advising him that it did not hold some of the requested information, that some of it was already publicly available and that some of it was considered excepted from disclosure in terms of regulation 10(4)(e), 10(5)(e) and 10(5)(f) of the Environmental Information (Scotland) Regulations 2004 (the EIRS). Following a review, Mr Mitchell remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had partially failed to deal with Mr Mitchell's request for information in accordance with the EIRs, by incorrectly applying the exceptions in regulation 10(4)(e), 10(5)(e) and 10(5)(f) to some of the information and required the Council to disclose this information to Mr Mitchell. The Commissioner also found that the Council had failed to comply with its duty to provide advice and assistance in terms of regulation 9(1) and required it to provide Mr Mitchell with advice and assistance which will enable him to identify and access certain information. However, the Commissioner found that the Council correctly applied the provisions of regulation 6(1)(b) and the exceptions in regulation 10(4)(e) and 10(5)(e) to the remainder of the information.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (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); 6(1)(b) (Form and format of information); 9(1) (Duty to provide advice and assistance) and 10(1), (2), (4)(e), 5(e) and (5)(f) (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 14 May 2010, Mr Mitchell wrote to the Council requesting information relating to the lease of site 15, Whitworth Road, Southfield Industrial Estate, Glenrothes. He indicated that this should include, but not be limited to all information contained in the following:
 - Details of any assessments, searches, reports or otherwise carried out by, or on behalf of, the Council.
 - Copies of any internal correspondence between Fife Council employees including meeting minutes, internal memos and notes.
 - Copies of any correspondence between Fife Council and its elected representatives.
 - All external correspondence between Fife Council and all non Fife Council employees and organisations and members of the public.
 - The detailed business plan submitted by Intelligent Energy (Europe) Ltd.
2. Mr Mitchell requested that, if any of the requested information contains personal data, exempt from release under section 38 of FOISA, the Council provide the information with the personal data redacted. He also requested that if any of the requested information was exempt under section 25 of FOISA, the Council advise where this information is accessible.
3. The Council responded to Mr Mitchell's request on 14 June 2010. The Council dealt with the request as one made under the terms of the EIRs, and applied the exemption in section 39(2) of FOISA to the requested information. The Council provided Mr Mitchell with some internal correspondence falling within the scope of his request. The Council also advised Mr Mitchell that it considered some of the information to be excepted from disclosure in terms of regulation 10(4)(e), 10(5)(e) and 10(5)(f) of the EIRs. The Council also advised Mr Mitchell that some of the information requested was already publicly available (a Committee report and minutes) and the Council was therefore (in terms of regulation 6(1)(b) of the EIRs) not obliged to release that information. The Council provided weblinks to assist Mr Mitchell in accessing this information online.
4. On 5 July 2010, Mr Mitchell wrote to the Council requesting a review of its decision. In particular, Mr Mitchell considered that the EIRs contained a presumption in favour of disclosing information and that the public interest favoured the withheld information being made available.
5. The Council notified Mr Mitchell of the outcome of its review on 2 August 2010. It recognised that there was a presumption in favour of disclosure unless the Council can show that there is a greater public interest in maintaining an exception. However, having balanced the public interest for and against disclosure, it concluded that the balance lay in favour of withholding the information. The Council therefore upheld its previous decision in full.



6. On 6 August 2010, Mr Mitchell 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.
7. The application was validated by establishing that Mr Mitchell had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

8. On 16 August 2010, the Council was notified in writing that an application had been received from Mr Mitchell and was asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on any provisions of FOISA and the EIRs it considered applicable to the information requested.
10. The Council responded on 6 December 2011 providing submissions on its application of the exceptions in regulation 10(4)(e), 10(5)(e) and 10(5)(f) of the EIRs. The Council also explained why it did not hold any additional information to that previously identified by it as falling within the scope of Mr Mitchell's request.
11. During the investigation the Council withdrew its application of regulation 10(5)(e) and 10(5)(f) to some of the withheld information (comprising company reports) and instead applied the provisions of regulation 6(1)(b) of the EIRs on the basis that the information was already publicly available and easily accessible to the applicant.
12. The investigating officer also contacted Mr Mitchell during the investigation seeking his submissions on the matters to be considered in the case. Mr Mitchell's submissions, along with those of the Council are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.



Commissioner's analysis and findings

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

The scope of the investigation

14. Mr Mitchell's application to the Commissioner expressed dissatisfaction with the Council's refusal to provide information to him on the basis that it considered there was a greater public interest in withholding the information. As Mr Mitchell has not expressed dissatisfaction with the Council's position that certain information is not held by it, nor with its position that the Committee report and minutes are already publicly available, the Commissioner has not considered these matters in this decision.

Handling in terms of the EIRs

15. From the point of its initial response, the Council considered the information that it held and which fell within the terms of Mr Mitchell's information request in terms of the EIRs, on the basis that it was environmental information, as defined in regulation 2(1) the EIRs.
16. Since Mr Mitchell's request sought information relating to a proposal to develop land for the purposes of constructing a new build manufacturing facility, the Commissioner agrees with the Council that the information sought in this request is environmental information for the purposes of the EIRs. The information relates to building and development work at a specified site involves measures (such as planning proposals) and activities (the operations on the site) affecting or likely to affect the elements referred to in part (a) of the definition, in particular air and atmosphere, land, landscape and natural sites or factors referred to in part (b) of the definition.
17. As such, the Commissioner is satisfied that any information held by the Council which falls within the scope of Mr Mitchell's request is environmental information as defined in part (c) of the definition.
18. The exemption in section 39(2) of FOISA provides that environmental information, as defined by regulation 2(1) of the EIRs, is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, having concluded that the information requested by Mr Mitchell is environmental information, the Commissioner accepts that the Council was entitled apply this exemption in its response to Mr Mitchell's request for information.
19. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exemption, and in dealing with the request in line with the requirements of the EIRs, outweighs any public interest in disclosure of the information under FOISA. The Commissioner has therefore proceeded to consider this case in what follows solely in terms of the EIRs.



Regulation 10(4)(e)

20. 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. For information to fall within the scope of the exception in regulation 10(4)(e), it need only be established that the information is an internal communication.
21. The Council applied this exception to a number of documents which, it stated, comprised internal emails and attachments between officers within the Council's Development Service and between Development Services and Corporate Asset Management Services.
22. The Commissioner notes that one of the withheld emails (document 10.56) was created after Mr Mitchell's information request on 14 May 2010. The Commissioner can only consider information that was held by the Council at the time of the request and has therefore discounted this document from consideration in this decision.
23. The Commissioner notes that the Council has already provided Mr Mitchell with copies of document 10.11 (a lease plan), 10.14 (comprising an email dated 2 September 2009) 10.20 (comprising an email dated 4 September 2009) and the emails timed at 15.43 and 17.36 in document 10.37 and that documents 10.49 to 10.53 comprise the Policy, Finance and Asset Management Committee report of 29 April 2010, which is published and to which the Council directed Mr Mitchell. These documents have therefore been discounted from consideration in what follows.
24. In this case, the Commissioner is satisfied that the majority of the information withheld under this exception comprises emails (and attachments) exchanged between officers within the Council. Accordingly, he is satisfied that these documents comprise internal communications and therefore fall within the scope of the exception.
25. However, the Commissioner is unable to accept that communications which originated from outwith the Council fall within the scope of the exception as they are not internal communications in the sense of communications within a discrete organisation.
26. Accordingly, the Commissioner does not accept that documents 10.33, 10.42 (email timed at 09.11) and 10.44 (email timed at 09.11 – the same as that contained in document 10.42) are internal communications for the purposes of this exception.
27. Documents 10.33, 10.42 (email timed at 09.11) and 10.44 (email timed at 09.11) are also contained within other information that has been withheld by the Council under a different exception which will be considered later in this decision.



Consideration of the public interest

28. Having upheld the use of the exception contained within regulation 10(4)(e), the Commissioner is required to consider the public interest test required by regulation 10(1)(b) of the EIRs. 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.
29. In his submissions to the Commissioner, Mr Mitchell noted that the Council had already provided him with some internal communications in response to his request. Additionally, he pointed out that regulation 10(2)(a) of the EIRs requires authorities to interpret the exceptions in a restrictive way and that regulation 10(2)(b) of the EIRs applies a presumption in favour of the disclosure of environmental information. He also argued that there is a general public interest in making the information available to enhance scrutiny of decision making and improve accountability and participation, particularly in the specific circumstances of this case.
30. In its submissions, the Council highlighted that the withheld emails comprised discussions about the Council's transaction with IE and, in particular, the commercial terms of the transaction. It argued that there was a strong public interest in ensuring that its officers could discuss internally the commercial terms of a transaction in the knowledge that the information would not be disclosed to a third party, especially when the commercial negotiations were ongoing.
31. The Council also argued that if it was obliged to release this information, officers would be reluctant to discuss and record information of this nature which would seriously impact on its ability to negotiate with third parties in order to obtain best value and, would hinder its ability to explore all options available to it.
32. In considering the public interest test, the Commissioner accepts that there is a general public interest in making information available to the public and a general need for transparency and accountability in internal debate and decision making, but this must be balanced against any detriment to the public interest as a consequence of disclosure.
33. The Commissioner is unable to conclude that there would be any detriment to the public interest by the disclosure of document 10.3 which is a map of the site under consideration. The Commissioner is also unable to conclude that the disclosure of the email timed at 15.52 in document 10.42 (which merely forwards another email) and document 10.48 (a covering email) would have any of the harmful effects envisaged by the Council. In all the circumstances, the Commissioner is satisfied that the public interest in making this information available is not outweighed by that in maintaining the exception in regulation 10(4)(e).



34. However, in all the circumstances of this case, having considered the withheld environmental information along with all relevant submissions, the Commissioner concludes on balance that the public interest in making the information, except for the information referred to in paragraph 33 above, available is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs. Therefore, he considers the Council was justified in withholding the majority of the information to which it applied this exception. It is the Commissioner's view that the disclosure of this correspondence may harm the candour with which officers may comment on similar matters in future. Additionally, he considers that the release of these documents may harm or prejudice ongoing negotiations on a matter of commercial sensitivity and their release would be detrimental to the public interest.
35. As no additional exceptions have been applied to the information withheld under regulation 10(4)(e), the Commissioner now requires the Council to disclose document 10.3, the email timed at 15.52 in document 10.42 and document 10.48 to Mr Mitchell.

Regulation 10(5)(e)

36. Regulation 10(5)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
37. In this case, the Council applied the exception in regulation 10(5)(e) to the remaining withheld information with the exception of two company reports.
38. The Aarhus Convention: an Implementation Guide¹ (which offers guidance on the interpretation of the Aarhus Convention) notes (at page 60) that the first test for considering this exception states that national law must expressly protect the confidentiality of the withheld information: it must, the guidance states, explicitly protect the type of information in question as commercial or industrial secrets. Secondly, the confidentiality must protect a "legitimate economic interest": this term is not defined in the Convention, but its meaning is considered further below.
39. The Commissioner has taken this guidance into consideration when considering this exception, for example in *Decision 033/2009 Mr Paul Drury and East Renfrewshire Council*. His view is that before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
- Is the information commercial or industrial in nature?
 - Does a legally binding duty of confidence exist in relation to the information?
 - Is the information publicly available

¹ <http://www.unece.org/env/pp/acig.pdf>



- Would disclosure of the information cause, or be likely to cause substantial harm to a legitimate economic interest

Is the information commercial or industrial in nature?

40. The information withheld under this exception comprises IE's Business Plan, two presentations to the Council prepared by IE, the draft Heads of Terms between the Council and IE and correspondence between the Council and IE.
41. The Council argued that all of the information withheld under this exception was commercial or industrial as it involved commercial information about IE and commercial negotiations regarding the site lease.
42. The Commissioner is satisfied that the information under consideration relates to IE's proposals for the development of the site and the ongoing negotiations between the Council and IE regarding the lease. As such, he is satisfied that the information is commercial in nature.

Does a legally binding duty of confidence exist in relation to the information?

43. The Council has argued that a legally binding duty of confidence exists between it and IE as (the Council states) it is widely acknowledged that information received and exchanged as part of the commercial negotiations between parties would have been received under an implicit obligation to maintain confidentiality and such an expectation would have been normal practice in a transaction of this kind.
44. Although it is only the copies of IE's presentations which contain an explicit statement that the information contained therein is considered private and confidential, the Commissioner is satisfied that all of the remaining information under consideration has been received and imparted under an implied obligation to maintain confidentiality. The Commissioner considers such an expectation to be normal legal practice in a contractual transaction of this kind.

Is the information publicly available?

45. The Council submitted that the information under consideration is not otherwise publicly available.
46. The Commissioner notes that, whilst the general import of the agreement between it and IE is in the public domain, including the general nature of the lease and the activities proposed by IE, the detailed nature of the agreement and ongoing discussions between the parties are not. The Commissioner also accepts that IE's Business Plan is not in the public domain.
47. The Commissioner is not however persuaded that all of the information contained within IE's presentations to the Council is not otherwise publicly available. The Commissioner notes that a considerable volume of the presentations simply reproduce statistical data and present background information on the biomass fuel industry. This cannot be described as information that is not otherwise publicly available.



Would disclosure of the information cause, or be likely to cause substantial harm to a legitimate economic interest?

48. The Council has argued that the interest in question in this case is commercial and financial in nature and that disclosing the information would cause substantial harm to the commercial interests of both the Council and IE. The Council submitted that the disclosure of the information would inhibit its ability to obtain best value for the Council.
49. Having considered the Council's arguments and, taking into account all of the circumstances surrounding the negotiations between the parties at the time of Mr Mitchell's request, the Commissioner is satisfied that the disclosure of the information contained in IE's Business Case, the draft Head of Terms between the Council and IE, the correspondence between the Council and IE and the information contained in pages 6.1.8 and 6.2.8 of the presentations made by IE to the Council would, or would be likely to cause substantial harm to both the Council's and IE's legitimate economic interests. The Commissioner considers therefore that the Council acted correctly in applying the exception in regulation 10(5)(e) to this information
50. The Commissioner is satisfied that these documents contain recent and significant commercial information concerning market conditions, IE's delivery methods and other sensitive financial information which would be of benefit to IE's competitors and by its disclosure would, or would be likely to, cause substantial harm to IE's legitimate economic interests.
51. The Commissioner is also satisfied that the nature of the information is such that its disclosure would impede the Council's ability to conclude the ongoing commercial negotiations with IE which are required to bring the transaction to a conclusion thereby causing substantial prejudice to the Council's legitimate economic interests.
52. The Commissioner is not however persuaded that the release of the remainder of the two presentations made by IE to the Council would result in the harm suggested by the Council. As noted above, a considerable volume of the information contained within the presentations is simply a general overview of the subject matter along with general information about IE and statistical and other information reproduced from other publicly available sources. In the circumstances, the Commissioner is unable to conclude that the disclosure of the presentations would, or would be likely to cause substantial harm to the legitimate economic interests of IE or the Council itself. He has therefore concluded that the Council was wrong to apply the exception in regulation 10(5)(e) to the majority of the information contained in the presentations.



Consideration of the public interest

53. Having upheld the use of the exception contained within regulation 10(5)(e) in relation to the withheld Business Case, draft Head of Terms between the Council and IE, correspondence between the Council and IE and some of the information contained in the presentations made by IE to the Council, the Commissioner is required to consider the public interest test set out in regulation 10(1)(b) of the EIRs. As noted previously, 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.
54. In its submissions, the Council argued that there was a strong public interest in maintaining the right to confidentiality of commercial negotiations between a public authority and a private operator and the right to confidentiality of commercial information supplied by the private operator to the Council as part of these negotiations, particularly where these are ongoing.
55. The Council also argued that, as the transaction in this case was still being negotiated, it could not be argued that the passage of time had diminished the commercial sensitivity of the information. Consequently, if the information were to be disclosed at this stage, then third parties may be reluctant to enter into open negotiations with the Council which would inhibit the ability of the Council to attract commercial entities to Fife and obtain best value for the Council.
56. In his submissions, Mr Mitchell provided general arguments in relation to the public interest test which are summarised at paragraph 29 above and do not need to be repeated here.
57. The Commissioner acknowledges that there is always a general public interest in making information held by public authorities accessible, to enhance scrutiny of decision making and thereby improve accountability and participation. In this case, it would contribute to public's understanding of a matter of public interest and may allow the public to make a judgement as to whether the Council is obtaining best value in its negotiations with third parties.
58. The Commissioner also accepts that there are relevant and valid arguments in this case which suggest that the public interest in making the information available is outweighed by the public interest in maintaining the exception. These include:
 - The general public interest in confidences being maintained,
 - The likelihood of commercial damage being caused to the Council or IE through disclosure of the information under consideration,
 - The likelihood that disclosure would have a detrimental effect on the ability of both parties to bring ongoing negotiations to a mutually satisfactory conclusion.



59. Having carefully weighed up the arguments, the Commissioner has concluded that in all the circumstances of the case, the public interest in making this information available in this instance is outweighed by the public interest in maintaining the exception. The Commissioner is mindful that this remain an unconcluded transaction and that there are ongoing negotiations between the Council and IE.
60. The Commissioner therefore concludes that the Council was entitled to apply the exception in regulation 10(5)(e) of the EIRs to the withheld Business Case, draft Head of Terms between the Council and IE, correspondence between the Council and IE and pages 6.1.8 and 6.2.8 of the presentations made by IE to the Council and acted in accordance with the EIRs in withholding this information.
61. As the Commissioner is not satisfied that the Council was entitled to withhold the remainder of the presentations made by IE under the exception in regulation 10(5)(e), he will now go on to consider whether the Council was entitled to withhold them under regulation 10(5)(f).

Regulation 10(5)(f)

62. Regulation 10(5)(f) states that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the interests of the person who provided the information where that person -
- (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
 - (iii) has not consented to its disclosure.
63. The Commissioner's briefing on regulation 10(5)(f)² states that certain points should be addressed in considering whether this exemption applies. These are:
- Was the information provided by a third party?
 - Was the third party under a legal obligation to provide the information?
 - Could the provider be required by law to provide it?
 - Would release of the information cause substantial harm to the interests of the information provider?
 - Is the information otherwise publicly available?
 - Has the information provider consented to disclosure?

² <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2583&SID=123>



64. The Commissioner accepts that the information under consideration was provided to the Council voluntarily by IE, in circumstances where IE was not under an obligation to supply it and could not be required by law to provide it. He also notes that, at the point where the Council considered Mr Mitchell's request for review, IE had not given its consent to disclosure. However, the Commissioner notes that the Council did not actively seek IE's consent to disclosure. The Commissioner also notes that IE has marked the documents as "private and confidential" and is therefore prepared to accept that by doing so, IE has indicated that it is not prepared to consent to the information being released to the public.
65. The Commissioner is satisfied that the tests in regulation 10(5)(f)(i), (ii) and (iii) have been satisfied. However, he must now go on to consider whether disclosure of this information would prejudice substantially the interests of the person who provided the information (as required for regulation 10(5)(f) to apply).
66. The Council submitted that the information had been provided by IE and that disclosure of the commercial information would prejudice substantially IE's interests. The Council argued that a commercial negotiation was being undertaken and release of the information would disclose business practices and commercial information to competitors and seriously damage business confidence.
67. However, as noted above in relation to the Commissioner's consideration of regulation 10(5)(e), the majority of the information contained in the presentations is essentially background and factual information about the biomass industry and IE itself. The Commissioner is unable to identify any content that would be capable of causing substantial prejudice to the interests of IE in the manner suggested by the Council.
68. The Commissioner is therefore satisfied that the Council cannot justify its reliance upon the exception in regulation 10(5)(f) of the EIRs, and the Council was accordingly wrong to have withheld the presentations made by IE from Mr Mitchell.
69. Having found that the exception was incorrectly applied to this information, the Commissioner has not gone on to consider the public interest test required by regulation 10(1) of the EIRs.
70. The Commissioner is aware that some of the information contained within the presentations comprises the personal data of certain named individuals. However, during the investigation, Mr Mitchell was contacted by the investigating officer and indicated that he was content for any personal data contained within the withheld information to be discounted from consideration in the decision. The Commissioner therefore requires the Council to disclose the presentations with the exception of the information contained in pages 6.1.8 and 6.2.8 of the presentations and the personal data of named individuals at pages 6.1.10, 6.1.18, 6.2.10 and 6.2.16 to Mr Mitchell.

Regulation 6 (1)(b) – Form and format of information



71. Regulation 6(1)(b) of the EIRs states that a Scottish public authority shall comply with a request that environmental information be made available in a particular form or format, unless the information is already publicly available and easily accessible to the applicant in another form or format. This is a two-part test, which must (for the regulation to apply) conclude that the information is both publicly available and easily accessible. As noted above, the Council applied the provisions of regulation 6(1)(b) during the investigation to certain company reports that it had instructed.
72. The Commissioner is satisfied that the information withheld under this provision (which comprises two company reports) is already publicly available in another format to that requested by Mr Mitchell (electronic or hard copy) in that it can be purchased through organisations specialising in the compilation of such reports. He is therefore satisfied that regulation 6(1)(b) applies.

Regulation 9 – Duty to provide advice and assistance

73. Regulation 9(1) of the EIRs provides that a Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.
74. As indicated above, the Council originally withheld company reports from Mr Mitchell on the basis that they were excepted from disclosure under regulation 10(5)(e) and 10(5)(f) of the EIRs, only identifying they were already publicly available during the Commissioner's investigation.
75. Where a public authority declines to provide information having identified that it is easily available to a requestor by other means, the Commissioner would expect that authority to explain this to the requestor and provide advice on how to locate the information.
76. The Commissioner notes that the Council has not advised Mr Mitchell of the public availability of information that may be of interest to him and has not provided advice to him on how this might be accessed.
77. In the circumstances, the Commissioner has concluded that the Council has failed to provide the type of advice and assistance that it was reasonable to expect given the nature of the information that was withheld from Mr Mitchell. The Commissioner has consequently found that the Council failed to comply fully with its duty under regulation 9(1) of the EIRs in this case.
78. The Commissioner now requires the Council to provide Mr Mitchell with advice and assistance which will enable him to identify and access the company reports in question.



DECISION

The Commissioner finds that Fife Council (the Council) failed to comply fully with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Mitchell.

The Commissioner finds that the Council correctly applied the exception in regulation 10(4)(e) to the majority of the internal correspondence between officers of the Council and was therefore entitled to withhold this information from Mr Mitchell.

The Commissioner also finds that the Council correctly applied the exception in regulation 10(5)(e) to the information identified at paragraph 60 above and was therefore entitled to withhold this information from Mr Mitchell.

However, the Commissioner finds that the Council incorrectly applied the exception in regulation 10(4)(e) to some of the internal correspondence between officers of the Council and incorrectly applied the exceptions in regulation 10(5)(e) and 10(5)(f) to the majority of the information contained in the presentations made to the Council by Intelligent Energy (Europe) Ltd (IE). By failing to supply this information, the Council failed to comply with the EIRs, and in particular regulation 5(1).

The Commissioner also finds that the Council failed to comply fully with its duty to provide advice and assistance to Mr Mitchell in terms of regulation 9(1).

The Commissioner therefore requires the Council to disclose to Mr Mitchell the information identified at paragraphs 35 and 70 above and to provide advice and assistance to enable Mr Mitchell to identify and access the company reports obtained by the Council by 23 May 2011.

Appeal

Should either Mr Mitchell or the 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
6 April 2011



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 –

- (a) the provision does not confer absolute exemption; and
- (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;

...

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.

...

6 Form and format of information

(1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-

...



- (b) the information is already publicly available and easily accessible to the applicant in another form or format.

9 Duty to provide advice and assistance

- (1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...

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.

- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

...

- (e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person-



- (i) was not under, and could not have been put under, any legal obligation to supply the information;
- (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
- (iii) has not consented to its disclosure; or

...