

Decision Notice

Decision 005/2018: Mr James McWilliam and Aberdeenshire Council

Correspondence about site of former Haddo Quarry

Reference No: 201701222

Decision Date: 16 January 2018



Scottish Information
Commissioner

Summary

The Council was asked for correspondence about the site of the former Haddo Quarry. It withheld information, explaining an investigation was still ongoing in connection with potential breaches of planning control. During the Commissioner's investigation, circumstances changed and the Council disclosed the information in full.

The Commissioner investigated and was satisfied with the Council's reasoning for withholding the information at the relevant time.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (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) (definition (a) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make available information on request); 10(1), (2) and (5)(b) (Exceptions from duty to make environmental information available)

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

Background

1. On 24 April 2017, Mr McWilliam made several requests for information to Aberdeenshire Council (the Council). In one of the requests, he asked for "all correspondence between Aberdeenshire Council and the owners and agents of the site of the former Haddo Quarry which does not currently have planning permissions for sand and gravel extraction."
2. The Council responded on 9 May 2017. It withheld the information sought by Mr McWilliam under section 34(1) of FOISA, stating that it held the information for the purpose of carrying out a thorough investigation to ascertain whether any significant material breach of planning control had occurred and whether, ultimately, this would require to be reported to the Procurator Fiscal.
3. On 16 May 2017, Mr McWilliam wrote to the Council, requesting a review of its decision on the basis that he could not see why details of any planning enforcement should have to be kept secret.
4. The Council notified Mr McWilliam of the outcome of its review on 9 June 2017, explaining why it now believed the request should be dealt with in terms of the EIRs, not FOISA. It continued to withhold the information, but stated that it was doing so under exceptions in the EIRs [these being regulations 10(4)(a) and 10(5)(b)].
5. On 12 July 2017, Mr McWilliam wrote to the Commissioner. Mr McWilliam applied to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Mr McWilliam stated he was dissatisfied with the outcome of the Council's review because it was difficult to understand why the withheld information could prejudice any court proceedings: his application related

only to the information withheld by the Council on this basis, and therefore only to the request set out in paragraph 1 above.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr McWilliam made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 10 October 2017, the Council was notified in writing that Mr McWilliam had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr McWilliam. The Council provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions, seeking to clarify its application of provisions of (as appropriate) FOISA and/or the EIRs.
9. During the investigation, the Council confirmed to the investigating officer that the planning enforcement process was no longer “live”, with the result that there was no longer any difficulty in disclosing information. The Council wrote to Mr McWilliam, disclosing the information it held at the time it received his request. Having received this information, Mr McWilliam confirmed that he still required a decision from the Commissioner

Commissioner’s analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both Mr McWilliam and the Council. He is satisfied that no matter of relevance has been overlooked.

Disclosed information

11. As noted above, the Council initially withheld all the information caught by the request. Due to a change in circumstances, the Council disclosed the information to Mr McWilliam on 8 January 2018. Mr McWilliam stated he still required a decision on the Council’s handling of his request: this must focus on whether the Council was correct in its handling of the request at the time of its review.

FOISA or EIRs?

12. The Council responded to Mr McWilliam’s requirement for review in terms of the EIRs. In its submissions to the Commissioner, it confirmed that it was applying the exemption in section 39(2) of FOISA.
13. Having considered the nature of the withheld information, the Commissioner is satisfied that it is environmental information as defined in regulation 2(1) of the EIRs. It relates to permitted land use and potential breaches of planning requirements which might lead to enforcement action. The Commissioner is satisfied that it would fall within paragraphs (a) and/or (c) of the definition, reproduced in the Appendix below.

Section 39(2) of FOISA – environmental information

14. The exemption in section 39(2) of FOISA provides, in effect, 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. During the investigation, the Council confirmed that it should have applied this exemption at review stage. In this case, the Commissioner accepts that the Council was entitled to apply the exemption to the requested information, given his conclusion that it is properly classified as environmental information.
15. 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 dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.
16. As the withheld information in this case is all environmental information, the Commissioner will consider the Council's handling of the request in what follows solely in terms of the EIRs.

Regulation 10(5)(b)

17. Regulation 10(5)(b) 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 course of justice, the ability of an individual to receive a fair trial or the ability of any public authority to conduct an inquiry or a criminal or disciplinary nature.
18. As with all exceptions in regulation 10, it is subject to the public interest test in regulation 10(1)(b) and, in line with regulation 10(1)(a), must be interpreted in a restrictive way with a presumption in favour of disclosure.
19. On 23 November 2017, the Council submitted that disclosure of the withheld information would adversely affect its ability to conduct an enquiry of a criminal nature.
20. The Council explained that, when it responded to Mr McWilliam's request and when it carried out a review in relation to that request, an investigation was ongoing to determine whether a breach of planning control had occurred at the site in question. This might have led to enforcement action, which might in turn have led to a report to the Procurator Fiscal in the event of non-compliance.
21. On 8 January 2018, the Council disclosed to Mr McWilliam the information it held and which he sought. By that time, it was satisfied that no breach of planning control had occurred, so there could be no enforcement action or subsequent prosecution.

The Commissioner's conclusions

22. Having considered the nature of the information which was held, and given the timing of the enforcement activity described by the Council, the Commissioner is satisfied that there was a reasonable risk of substantial prejudice to potential enforcement action, and thus to the success of any subsequent prosecution, had the information been disclosed in response to Mr McWilliam's information request or his requirement for review. Disclosure would, therefore, have been likely to prejudice substantially the Council's ability to conduct an inquiry of a criminal nature.
23. Consequently, the Commissioner finds that the information was properly excepted from disclosure under regulation 10(5)(b) of the EIRs.

Public interest test

24. If he is to find that the Council was correct to withhold the information under regulation 10(5)(b), 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.
25. The Council highlighted the prejudice to an ongoing investigation, and to any prosecution which might follow, had the information been disclosed at the time of Mr McWilliam's request or his requirement for review. On balance, the Council considered the public interest in withholding the information outweighed that in making it available, at that time.
26. Having considered all the circumstances here, on the arguments he has received, the Commissioner recognises there is a strong public interest in understanding decision making by planning authorities in respect of land use and enforcement issues.
27. On the other hand, the Commissioner must bear in mind the relevance of the withheld information to future enforcement action and related prosecution processes, at the time it was withheld. In areas such as that addressed by this enforcement action, in particular, there is a clear public interest in the Council being free to take the most appropriate and effective action in the interests of its citizens.
28. On balance, the Commissioner finds the public interest in maintaining the exception in regulation 10(5)(b) outweighed that in making the information available, when it was withheld. Consequently, he accepts that the Council was correct to withhold the information under regulation 10(5)(b) of the EIRs.

Decision

The Commissioner finds that Aberdeenshire Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr McWilliam.

Appeal

Should either Mr McWilliam or the Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Margaret Keyse
Head of Enforcement

16 January 2018

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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

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;

...

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)–

...

(b) is subject to regulations 6 to 12.

...

10 Exceptions from duty to make environmental information available–

(1) A Scottish public authority may refuse a request to make environmental information available if–

(a) there is an exception to disclosure under paragraphs (4) or (5); and

(b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

(2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall–

(a) interpret those paragraphs in a restrictive way; and

(b) apply a presumption in favour of disclosure.

...

(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–

...

- (b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;

...

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