

# Decision Notice

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## **Decision 086/2018: Company A and Highland Council**

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### **Pre-planning application communications regarding potential UK Space Agency launch sites**

Reference No: 201701871

Decision Date: 21 June 2018



Scottish Information  
Commissioner

## Summary

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The Council was asked for communications between the interested parties in the course of pre-planning application processes relating to potential development of UK Space Agency launch sites in Sutherland.

The Council provided weblinks to some background information and withheld the requested information as commercially confidential. On review, it maintained this position.

The Commissioner investigated and found that the Council had partially failed to respond to the request in accordance with the EIRs. Its submissions only justified withholding some of the information, so the Commissioner could not uphold its withholding of the remainder. As the remaining information was disclosed during the investigation, the Commissioner did not require the Council to take any action.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information") (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (5)(e) (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

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1. On 9 June 2017, Company A made a request for information to Highland Council (the Council). The information requested related to pre-planning application processes for potential UKSA (UK Space Agency) launch sites in Sutherland. The request sought:  
*"... all details and copies of all or any communications between the Council and Lockheed Martin and/or HIE [Highlands and Islands Enterprise] in connection with pre-planning application procedures and meetings, including any formal major planning application package responses provided to these parties or their agents in connection with the above possible project."*
2. The request was made on behalf of Company A by Graham and Sibbald, Chartered Surveyors, and the submissions referred to in this decision as being from Company A should be taken to be from Graham and Sibbald on behalf of Company A.
3. The Council responded on 7 July 2017. It provided weblinks to background information and withheld the requested information under regulation 10(5)(e) of the EIRs (commercial confidentiality).
4. On 10 July 2017, Company A wrote to the Council, requesting a review of its decision as it believed it was unreasonable to withhold the information, which it considered essential in relation to an unresolved matter in the Caithness and Sutherland Local Development Plan.

5. The Council notified Company A of the outcome of its review on 4 August 2017. The Council informed Company A that HIE had submitted a request for pre-planning application advice, relating to the sites in question. It explained that it gave assurances to bodies using this service (which was not provided under a legal obligation, but was encouraged for major development proposals) that any information considered confidential would be protected as such until a full planning application was made. HIE considered the locations of the potential sites to be confidential and the Council submitted that all the information being withheld related to these specific sites and would therefore divulge the locations.
6. The Council also advised that, at some point in the near future, the UKSA would be coming to a decision on a number of sites across the UK. At that point, the companies involved with the HIE proposals would know whether they were likely to progress to a planning application or not. At that time, the information could be made public. Until then, the Council stated, it upheld its application of regulation 10(5)(e).
7. On 26 October 2017, Company A wrote to the Commissioner. Company A applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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. Company A stated it was dissatisfied with the outcome of the Council's review because it disputed that the information being withheld was confidential and did not believe there were any public interest arguments for withholding it.

## **Investigation**

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8. The application was accepted as valid. The Commissioner confirmed that Company A 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.
9. On 16 November 2017, the Council was notified in writing that Company A had made a valid application. The Council was asked to send the Commissioner the information withheld from Company A. The Council provided the information and the case was allocated to an investigating officer.
10. 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, with specific reference to its application of regulation 10(5)(e) of the EIRs.
11. Company A was also asked for comments on the public interest. Both parties provided submissions to the investigating officer.
12. During the investigation, the Council disclosed the majority of the withheld information to Company A, but continued to withhold information which would identify the sites in question.

## **Commissioner's analysis and findings**

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

## **Application of the EIRs**

14. The Council's response to Company A's request for information was made in terms of the EIRs and Company A has not disputed this.
15. The Commissioner is satisfied that the information requested comprises environmental information, as defined in regulation 2(1) of the EIRs. The information falls within paragraph (c) of the definition of environmental information contained in regulation 2(1) of the EIRs, being information on measures and activities affecting or likely to affect the state of those elements of the environment referred to in paragraph (a) of the definition. The Commissioner will consider the information in what follows solely in terms of the EIRs.

## **Regulation 5(1) of the EIRs - duty to make environmental information available**

16. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. This obligation relates to information that is held by the authority when it receives a request.
17. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
18. The Commissioner will firstly look at the Council's disclosure of information during his investigation and then go on to consider the application of regulation 10(5)(e) of the EIRs to the remainder of the information.

## **Information disclosed during the investigation**

19. In its submissions to the Commissioner, the Council stated that it was withholding the information because it was information from which potential site locations could be identified. This, it argued, was commercial information provided in confidence by HIE.
20. The investigating officer queried whether all of the withheld information could be used to identify the sites in question. After consideration, the Council acknowledged that a considerable quantity of the information had no locational significance. However, although it had argued that only the information relating to locations could be regarded as confidential – and therefore subject to regulation 10(5)(e) – it continued to withhold the remainder on the basis that HIE showed no willingness to disclose any of it. It did not seek to apply any other exception to this remaining information.
21. After further discussions, the Council disclosed all of the non-locational information to Company A. It did not seek to suggest that it had been properly withheld earlier.
22. In failing to disclose this information at the time of the review outcome, at the latest, the Commissioner finds that the Council failed to comply with regulation 5(1) of the EIRs.
23. The Commissioner would also make it clear that the final decision as to whether information should be disclosed or withheld rests with the authority which is asked for, and holds, that information. If a third party (in this case HIE) has an interest in potential disclosure, this is something that the authority can (and generally should) take into account, but in reaching a decision the authority remains responsible for justifying why the information should be withheld. An interested party simply stating that the information should not be disclosed is not a sufficient reason for an authority's withholding it – as HIE, another Scottish public authority under the EIRs should be well aware. A valid exception, or other relevant provision

of the EIRs (or FOISA, as the case may be), will always be needed to justify refusing a request.

24. The Commissioner will now go on to consider the Council's application of regulation 10(5)(e) to the information it continued to withhold.

### **Regulation 10(5)(e) of the EIRs: commercial confidentiality**

25. Regulation 10(5)(e) 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.
26. The application of regulation 10(5)(e) of the EIRs was fully considered in *Decision 033/2009 Mr Paul Drury and East Renfrewshire Council*<sup>1</sup> and the Commissioner does not intend to repeat that consideration in detail here. The Commissioner concluded that, before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
- (i) is the information commercial or industrial in nature?
  - (ii) does a legally binding duty of confidence exist in relation to the information?
  - (iii) is the information publicly available?
  - (iv) would disclosure of the information cause, or be likely to cause, substantial prejudice to a legitimate economic interest?

#### *Is the information commercial or industrial in nature?*

27. The Council stated that it considered the information to be commercial in nature. It described the information as including the plans and purposes of named developers, which were not at the time fully formed, and as such was considered to be commercial information.
28. Having viewed the information in question and taking account of circumstances in which it was produced, the Commissioner is satisfied that the withheld information is commercial in nature.

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

29. The Council submitted that while some information on the wider areas under consideration for locating the project was in the public domain, information on specific locations was not.
30. The Council submitted that HIE has signed a non-disclosure agreement relating to dealings with the UKSA and the developers. The Council itself had not signed such an agreement, but it stated that HIE had provided the information under an expectation of confidentiality. It provided supporting correspondence from HIE.
31. The Council explained that its Planning Service treated pre-application advice provided to potential developers as sensitive and confidential. The Council stated that during various meetings that it had had with HIE on the proposal over a considerable period of time, HIE had impressed on the Council the commercial sensitivity of the development and the need for confidentiality. This had been taken forward in all the discussions between Council officers and HIE.

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<sup>1</sup> <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2009/200800429.aspx>

32. The Commissioner accepts, in the circumstances, that the remaining withheld information was provided to the Council subject to an obligation of confidentiality and is not in the public domain.

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

33. The Council submitted that relevant parties could use the information to disrupt the process of taking the potential development forward. The Council submitted that discussions regarding funding were at a crucial stage and that awareness of the potential sites could be used to disrupt this process, to the detriment of the commercial parties involved. It argued that the appropriate time to discuss the information in the public domain would be when a formal planning application was submitted (or when statutory pre-application consultation was instigated, should that be required).
34. The Council noted that a presentation on the development options was made on 27 February 2018, which gave some information to the community but did not disclose the exact locations under consideration.
35. In summing up, the Council argued that prejudice would be caused to its own legitimate economic interests because disclosure would deter developers from using the pre-planning service in future, resulting in revenue being lost to the public purse. The Council also argued that prejudice would be caused to the legitimate economic interests of those pursuing the project, if it were impeded. This would cause detriment to the local economy, which could benefit significantly from the project.

#### *The Commissioner's conclusions*

36. In making a decision as to whether disclosure of the withheld information would have caused (or would have been likely to cause) substantial harm to the legitimate economic interests of the Council and of those pursuing the potential development, the Commissioner must base his conclusions on the circumstances at the time the Council responded to Company A's requirement for review. He must do so, of course, without taking any view on the merits of the project under consideration or the potential outcome of any future planning application.
37. Having taken all of the submissions into account, and having considered the remaining withheld information, the Commissioner is satisfied that disclosure of the information would have caused, or would have been likely to cause, substantial prejudice to the ongoing economic interests of the parties referred to.
38. He accepts the arguments put forward by the Council that disclosure of this particular information would be likely to affect its future ability to attract potential developers to use the Council pre-planning service, which would result in a drop in Council revenue, to the detriment of public finances (and, possibly, the effectiveness of the planning process). More compellingly, in this case, he accepts the arguments put forward as to the risk of disruption to the project should information on locations be disclosed at this stage, and as to the consequent commercial harm.
39. Consequently, the Commissioner is satisfied that the Council was entitled to apply regulation 10(5)(e) of the EIRs to the remaining withheld information, in this particular case. This should not be read as a blanket endorsement of this exception to all information arising from pre-planning application discussions. Each public authority considering such information must consider, in each individual case, whether particular information should be withheld

under this (or, for that matter, any other) exception. In each case, the requirements of the relevant exception must be met.

#### *The public interest test*

40. Having accepted that the exception in regulation 10(5)(e) applies to the information, the Commissioner must consider the public interest test in regulation 10(1)(b) of the EIRs. This specifies that a Scottish 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.

#### Submissions from Company A

41. Company A submitted that it could see no public interest in the information being withheld.

#### Submissions from the Council

42. The Council accepted that there was a public interest in the nature of the potential development. However, at the time of the request, it was not known whether the development would go ahead. The Council stated that HIE had confirmed the information could be published once the UKSA funding decision had been made.
43. If the locational information was disclosed while commercial discussions were still ongoing, the Council argued, it could adversely affect the discussions to the detriment of the interests of those involved. Once this stage of negotiations was complete, the Council believed it should be possible to disclose further information.
44. It was the Council's view that this project could be one of major significance to the UK and of significant positive benefit to the Highlands of Scotland. While the commercial elements were being weighed by the parties, it would be the wrong time to release the private information shared by the companies.
45. The Council also reiterated its perception that take-up of its (voluntary) pre-planning advice service would be reduced in the event of disclosure. This will lead to a loss of income and, potentially, more work for Council staff in the face of continuing budget cuts. The Council believed that it was important that it was able to provide the pre-application service in the economic interests of the area.
46. The Council believed these arguments outweighed the public interest in publishing the exact locations contained in the proposal. Information had already been published in relation to the area of interest, as indicated to Company A already. At the time of its review, therefore, and at the present time, it was the Council's view that the public interest favoured withholding the information.

#### *The Commissioner's conclusions*

47. The Commissioner acknowledges that there is a public interest in knowing the exact location of the site(s) where the development would be proposed. However, he notes that this information will be made public in due course: it would need to be, in the course of the statutory planning process. At that point it would be appropriate for anyone with interest and/or objections to put them forward as part of the actual planning application process. At the time of the Council's review, and still, he acknowledges substantial arguments for maintaining the exception, given the likely detriment from disclosure.
48. The Commissioner, having considered the arguments advanced by both parties carefully, has concluded that the public interest in making the information available is outweighed by

the public interest in maintaining the exception in regulation 10(5)(e) of the EIRs. He is therefore satisfied that the Council was entitled to withhold the remaining information (relating to locations) under regulation 10(5)(e) of the EIRs.

## **Decision**

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The Commissioner finds that Highland Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Company A.

The Commissioner finds that by withholding some information (in relation to specific site locations) under regulation 10(5)(e), the Council complied with the EIRs. However, the Council failed to comply with the EIRs by withholding other information under that same exception.

Given that the Council disclosed the wrongly withheld information during the investigation, the Commissioner does not require the Council to take any action in respect of this failure, in response to Company A's application.

## **Appeal**

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Should either Company A 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**

**21 June 2018**



### 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-

...

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

...

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