

Decision Notice

Decision 100/2018: Mr N and Aberdeenshire Council

Legal advice

Reference No: 201800513

Decision Date: 5 July 2018



Scottish Information
Commissioner

Summary

The Council was asked for the legal opinions it had received with regard to the title of a specified plot of land.

The Council refused the request, stating that the information was subject to legal professional privilege and therefore exempt from disclosure. Following a review, Mr N remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had failed to respond to Mr N's request for information wholly in accordance with the EIRs, but was entitled to withhold the information under regulation 10(5)(d). He did not require the Council to take any action.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a) and (c) of definition of "environmental information"), 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (5)(d) (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 17 September 2017, Mr N made a request for information to Aberdeenshire Council (the Council). He referred to a plot of land at Newtonhill, known as P2 on the current Local Development Plan, and made the following request:

"...you mentioned that the title has been scrutinised by lawyers, both employed by Aberdeenshire Council and external and also the opinion of Counsel was also sought. Please can you let me have a copy of these findings?"
2. The Council responded on 12 October 2017. It considered that the exemption at section 36(1) of the Freedom of Information (Scotland) Act 2002 (FOISA) (Confidentiality) applied and that there was a strong public interest in upholding the exemption.
3. On 6 November 2017, Mr N wrote to the Council requesting a review of its decision. He was concerned that the Council did not have the right to sell what was, in effect, common land and felt that it should be completely open about how it reached the decision that it was legally allowed to sell the land.
4. The Council notified Mr N of the outcome of its review on 1 December 2017. It upheld the original decision that section 36(1) of FOISA applied to the information he had requested.
5. On 14 March 2018, Mr N 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 N stated he was dissatisfied with the outcome of the Council's review because he considered

that the plot of land was gifted to the people of Newtonhill and that the Council's decision had been taken in closed session. This decision was informed by the advice he wished to see, advice paid for with public money. Mr N believed the Council should be open and honest, and suggested names could be redacted from the information if necessary to allow disclosure.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr N 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 May 2018, the Council was notified in writing that Mr N had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr N. 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 including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.

FOISA or EIRs?

9. The Council was asked to consider whether, given the subject matter, the request should have been dealt with under the EIRs. The Council took the view that the information did not appear to fall within any of the categories of environmental information set out in regulation 2 of the EIRs, but submitted that if it did, the Council would apply the exception in regulation 10(5)(d) of the EIRs.
10. The Commissioner considers that the information under consideration in this case is environmental information. The information in question consists of legal advice regarding legal restrictions on sale of land for the purposes of a service road to an adjoining residential development. The Commissioner considers it to be information which falls under the definition of environmental information in regulation 2(1) of the EIRs, in particular paragraphs (a) and (c) of that definition, as it relates directly to the sale of land for a purpose which will affect the state of the land.
11. After consideration, the Council confirmed that the information was withheld under regulation 10(5)(d) of the EIRs only. Given the Commissioner's view that the withheld information is properly classified as environmental, he will consider the decision to withhold the information solely in terms of the EIRs.

Commissioner's analysis and findings

12. 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 Mr N and the Council. He is satisfied that no matter of relevance has been overlooked.

Regulation 5(1) of the EIRs

13. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
14. Given that the information withheld from Mr N is environmental information, as defined in regulation 2(1) of the EIRs, the Council should have responded to Mr N's request in terms of the EIRs. In this respect, the Council failed to comply with regulation 5(1).

Regulation 10(5)(d) of the EIRs – confidentiality provided for by law

15. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.
16. The Council withheld the information requested by Mr N under regulation 10(5)(d) of the EIRs. Regulation 10(5)(d) 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 confidentiality of the proceedings of any public authority where such confidentiality is provided for by law.
17. Regulation 10(2) of the EIRs states that exceptions must be interpreted in a restrictive way, with presumption in favour of disclosure. Even where the exception applies, the information must be made available unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
18. Regulation 10(5)(d) refers to “the proceedings of any public authority”. In its publication “The Aarhus Convention: an implementation guide”¹, the Economic Commission of Europe notes at page 81 that the Convention does not comprehensively define “proceedings of public authorities”, but suggests that one interpretation is that these may be proceedings concerning the internal operations of a public authority rather than substantive proceedings conducted by the public authority in its area of competence. The confidentiality under this exception must be provided for under national law.
19. The Council submitted that the findings of lawyers, external lawyers and the Opinion of Counsel are covered by legal advice privilege, and none of the exceptions to legal professional privilege set out in the Commissioner's guidance² applied in this case.
20. The first matter to be considered by the Commissioner is, therefore, whether the information relates to proceedings of the Council, the confidentiality of which is protected by law. He must then consider whether disclosure of the information would, or would be likely to, prejudice substantially that confidentiality.
21. For information to be confidential under the common law, two main requirements must be met:
 - (i) The information must have the necessary quality of confidence about it and it must not be generally accessible to the public already; and

¹ http://www.unece.org/fileadmin/DAM/env/pp/ppdm/Aarhus_Implementation_Guide_second_edition_-_text_only.pdf

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section36/Section36.aspx>

- (ii) The information must have been communicated in circumstances importing an obligation of confidentiality.

Does the information have the necessary quality of confidence?

- 22. The Council provided the Commissioner with a copy of the Opinion of Counsel falling within the scope of the request. It also provided a summary paper which had been made available to Mr N and other interested parties, confirming the Council's legal right to sell the part of the land in question.
- 23. The Commissioner accepts that no other party, other than the Council's legal adviser or the Council itself, has seen or had access to the legal advice from Counsel. The summary document distributed to interested parties is very general in its terms, without any of the reasoning provided by Counsel and so, whilst confirming the view that the Council was legally entitled to sell, does not compromise the confidentiality of the Opinion of Counsel. In the circumstances, the Commissioner is content to accept that the withheld information has the necessary quality of confidence.

Was the information communicated in circumstances importing an obligation of confidentiality?

- 24. The Council submitted that the information held within the scope of the request was legal advice in the form of Opinion of Counsel and that it was legal advice that had been sought by the Council with regard to restrictions on the land in question. The Opinion comprised communications between lawyer and client (the Council) in the course of which legal advice was sought or given. The following conditions were fulfilled:
 - (i) The information must relate to communications with a professional legal adviser, such as a solicitor or an advocate;
 - (ii) The legal adviser must be acting in their professional capacity; and
 - (iii) The information must be confidential.
- 25. The Commissioner is satisfied that the withheld information is legal advice provided by a legal adviser within the context of a professional relationship in circumstances in which legal professional privilege could apply. The legal adviser was clearly acting in their professional capacity in providing advice to the Council.
- 26. Having considered in full the submissions from the Council, the Commissioner takes the view that a claim to confidentiality of communications could be maintained in legal proceedings in respect of this information. The document is clearly legal advice and is marked as Opinion of Counsel and for the intended recipient only. The substance of the advice received has not been disclosed in the summary released by the Council, and the Commissioner has received no evidence to suggest that the advice has otherwise been disclosed: he therefore accepts that the confidentiality of the advice has been maintained.

Would disclosure prejudice substantially, or be likely to prejudice substantially, the confidentiality of proceedings?

- 27. The Commissioner must also consider whether disclosure would prejudice substantially, or be likely to prejudice substantially, the confidentiality of proceedings.
- 28. The Commissioner is clear that the test of substantial prejudice is a high one, requiring real risk of actual, significant harm. That said, given the content of the information and its

inherently confidential nature, the Commissioner accepts that making this information available would have caused, or would have been likely to cause, substantial prejudice to the confidentiality of the Council's proceedings. Consequently, the Commissioner accepts that this test is met.

29. As all relevant tests have been met, the Commissioner is satisfied that the exception in regulation 10(5)(d) applied to the information.
30. The Commissioner must consider whether the public interest in making the information available is outweighed by the public interest in maintaining the exception (as required by regulation 10(1)(b) of the EIRs).

The public interest test

31. Mr N was concerned that the Council was not acting in an open, honest and accountable manner by not disclosing the legal argument which informed the decision to sell the land. He made the point that the decision was taken in closed session, and was informed by the legal opinion he wished to see. He noted that the Commissioner's guidance on the public interest test says that public authorities should consider whether disclosure would enhance scrutiny of decision-making processes and thereby improve accountability and participation.³ He did not agree that the public interest in withholding this information outweighed significantly the public interest in release.
32. The Council submitted that the findings of lawyers, external lawyers and the Opinion of Counsel all fall within legal advice privilege. The Council considered that the public interest had been satisfied by providing a summary of the advice it had received, which confirmed its entitlement to sell the land. The Council asserted that there was a strong public interest in maintaining the exception in regulation 10(5)(d): upholding the principles of confidentiality and legal privilege are fundamental aspects of the legal system and subsequently should outweigh the public interest in release of the information. The Council considered that the public interest in maintaining the exception outweighed the public interest in making the information available.
33. The Commissioner must consider any information which is the subject of legal professional privilege in the light of the established, inherent public interest in maintaining the confidentiality of communications between legal adviser and client. The courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England* (2004) UKHL 48⁴. The Commissioner will apply the same reasoning to communications attracting legal professional privilege generally. More generally, he considers there to be a strong public interest, also recognised by the courts, in the maintenance of confidences.
34. The Commissioner acknowledges that disclosure of the information requested by Mr N would increase public understanding of the issues considered by the Council in relation to the gifting of the land and any subsequent right to sell part of this land for development. He

³ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/ThePublicInterestTestEIRs.aspx>

⁴ <http://www.bailii.org/uk/cases/UKHL/2004/48.html>

acknowledges the public debate around this proposed transaction. The Commissioner accepts that there is a clear public interest in understanding how the Council addressed the issue, in ensuring it had adequate and appropriate legal advice and in providing more clarity on the Council's legal right to sell the land.

35. Conversely, the Commissioner recognises the strong public interest in ensuring that the Council can receive legal advice in confidence to facilitate it in discharging its functions as thoroughly and effectively as possible. This is particularly the case where the legal advice concerns an issue which may be subject to legal challenge.
36. The Commissioner considers that the disclosure of such information could discourage a public authority from seeking legal advice, or would deter the frankness and openness of parties involved when seeking legal advice if there was an assumption that the advice may be then disclosed. If, for this reason, the Council was unable to obtain impartial and objective legal advice in respect of its actions, this would not be in the public interest.
37. Therefore, on balance, the Commissioner is not satisfied that the public interest arguments in favour of disclosure are so strong as to outweigh the public interest arguments in maintaining the exception. Consequently, he finds that the public interest in maintaining the exception outweighs the public interest in making the information available, and accepts that the information was properly withheld under regulation 10(5)(d) of the EIRs.

Decision

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

The Commissioner finds that by failing to identify the requested information as environmental information and failing to respond to the request under the EIRs, the Council failed to comply with regulation 5(1) of the EIRs.

However, the Commissioner accepts that the Council was entitled to withhold information under regulation 10(5)(d) of the EIRs.

The Commissioner does not require the Council to take any further action in relation to Mr N's application.

Appeal

Should either Mr N or Aberdeenshire 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

5 July 2018

Appendix 1: Relevant statutory provisions

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-

...

(d) the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law;

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