

Decision Notice

Decision 129/2019: Community Windpower Ltd and East Ayrshire Council

Planning Application – Sneddon Law Community Wind Farm

Reference No: 201801594

Decision Date: 23 August 2019



Scottish Information
Commissioner

Summary

The Council was asked for internal correspondence relating to Sneddon Law Community Wind Farm.

The Council disclosed some information, but withheld other information under a number of exceptions in the EIRs. During the investigation, the Council amended its position on one exception but continued to withhold the information under other exceptions.

The Commissioner was satisfied that all the information comprised internal communications and that the Council was entitled to withhold those communications under regulation 10(4)(e) of the EIRs.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a), (c) and (f) of definition of “environmental information”); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2) and (4)(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

1. This case concerns Sneddon Law Community Wind Farm, planning application 13/0198/PP and Enforcement Notice/Stop Notice EN17/0216/UA.
2. On 16 May 2018, Community Windpower Ltd (CW Ltd) made 10 requests for information to the Council in which it asked for:
“... copies of all internal correspondence (letters, emails, memos, meeting minutes)”
sent by the individual named in each of the requests to the other individuals named in the requests.
3. The Council responded on 12 July 2018, disclosing some information. The Council cited section 39(2) of the Freedom of Information (Scotland) Act 2002 (FOISA) and confirmed it would deal with this request under the EIRs, all the information caught being environmental information. The Council withheld the majority of the information it held, citing regulations 10(4)(e) (internal communications), 10(5)(d) (confidentiality of proceedings) and 10(5)(f) (third party interests).
4. On 27 July 2018, CW Ltd wrote to the Council requesting a review of its decision. CW Ltd did not accept that any of the exceptions listed above were applied correctly by the Council and gave detailed reasons.
5. The Council notified CW Ltd of the outcome of its review on 27 August 2018. It upheld the original response, with some modification. The Council continued to rely on two exceptions to withhold information but it no longer relied on regulation 10(5)(f). This was because it no

longer considered the information withheld under 10(5)(f) actually addressed this request so it could not be in scope.

6. On 25 September 2018, CW Ltd wrote to the Commissioner's office. CW Ltd 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. CW Ltd was dissatisfied with the outcome of the Council's review. It disagreed with the application of both of the exceptions claimed, on the ground that the information should be disclosed in the public interest. CW Ltd did not dispute the Council's interpretation of the scope of the request.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that CW Ltd 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.
8. On 17 October 2018, the Council was notified in writing that CW Ltd had made a valid application. The Council was asked to send the Commissioner the information withheld from CW Ltd and did so. The case was allocated to an investigating officer.
9. 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 to answer specific questions, focusing on the legal tests for each of the exceptions cited.

Commissioner's analysis and findings

10. 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 CW Ltd and the Council. He is satisfied that no matter of relevance has been overlooked.

Handling in terms of the EIRs

11. In its correspondence with CW Ltd, the Council identified all of the information requested as being environmental information, as defined in regulation 2(1) of the EIRs. Having reached this conclusion, it applied section 39(2) of FOISA.
12. The Commissioner is satisfied that the withheld information, relating to a relatively substantial development (a wind farm), falls within the definition of environmental information in regulation 2(1), particularly paragraphs (a), (c) and (f) (see Appendix 1).
13. 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. In this case, the Commissioner accepts that the Council was entitled to apply the exemption to the information withheld in this case, given his conclusion that it is properly classified as environmental information.
14. The exception in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. As there is a statutory right of access to environmental information available to CW Ltd in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any

public interest in disclosing the information under FOISA. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.

15. The Commissioner therefore concludes that CW Ltd was correct to apply section 39(2) of FOISA, and consider CW Ltd's information request wholly under the EIRs. In what follows, the Commissioner will consider this case 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 (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. This obligation relates to information held by the authority when it receives a request.
17. 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.

Regulation 10(4)(e) – internal communications

18. Under regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that it involves making available internal communications. In order for information to fall within the scope of this exception, it need only be established that the information is an internal communication. However, if the Commissioner finds that a document is an internal communication, he will be required to go on to consider the public interest test in regulation 10(1)(b).
19. The Council applied this exception to all of the withheld information within a series of internal emails seeking and providing legal advice and other comment on the planning application for Sneddon Law Community Wind Farm and related compliance with planning legislation. The Council stated that the information comprised entirely internal communications, in this instance among individuals within the Council named in the request.
20. In their application, CW Ltd confirmed that the request was for information in respect of internal communications between Council officials, and emphasised it was not seeking correspondence between Council officials and their external legal advisors. CW Ltd stated "We still disagree with the Council's interpretation of [the EIRs]..."
21. The Council submitted that the exception in regulation 10(4)(e) of the EIRs recognises the importance of "private space" for deliberation and referred to the reasons it provided in its response and review letters to CW Ltd for withholding the information. It submitted that CW Ltd's requirement for review did not dispute that internal communications are caught by this exception, rather they focused on the public interest test for this exception.

Commissioner's view

22. Under the EIRs, provided the information comprises internal communications, the exception will apply. In this case, CW Ltd itself has clarified in its application that it was only seeking internal communications between Council officials (not those with an external adviser).
23. Having considered the information withheld by the Council under this exception, the Commissioner is satisfied that all of this information does indeed comprise internal

communications and is therefore subject to the exception in regulation 10(4)(e). To the extent that third parties have been included in what are essentially internal exchanges, the Commissioner is satisfied that they have been included as advisers to the Council and that their inclusion does not affect the quality of the Communications in question as “internal”.

24. He must, therefore, go on to consider whether, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

The public interest

CW Ltd's submissions

25. In its requirement for review, CW Ltd noted the purpose of the public interest test and identified what it considered to be unique circumstances, there having been no less than three Public Local Inquiries (PLIs) under the Town and Country Planning (Scotland) Act 1997¹ (TCP SA), at considerable cost to taxpayers. CW Ltd explained that a PLI had recently been convened to examine the validity of the actions which were the subject of this request. Given the clear statutory and public nature of a PLI convened in this manner, combined with an inherent obligation for the public to critique decision making processes in cases of considerable public expenditure, CW Ltd judged there to be a substantial and evident public interest in making the requested information available.
26. CW Ltd also submitted that the improper use of Stop Notices under section 140(1) of the TCP SA by a local authority could, in a number of specified circumstances, result in compensation for loss being paid by the authority (under section 143(1) of the TCP SA). CW Ltd explained that ultimately such compensation burdens taxpayers and, on this basis, CW Ltd believed the public interest would best be served by disclosing the information requested.
27. CW Ltd also queried whether Council Officials circumvented the provisions of the Local Government (Scotland) Act 1973² (“LGSA”). In CW Ltd’s view, disclosure would verify whether Council officials followed the correct processes, in terms of both the remit and statutory functions of local authorities. It contended this was particularly relevant here, given the costs to the public and any risk of compensatory claims which might follow. It also referred, amongst others, to section 95 of the LGSA, which requires local authorities to make arrangements for the proper administration of their financial affairs, including securing that the proper officer of the authority has responsibility for the administration of those affairs). CW Ltd commented that, “in light of the unbalanced budget identified by Audit Scotland in their 2015/2016 Annual Report, there are valid questions over whether the Council and its Proper Officer have competently observed their fiduciary duties under the LGSA”.
28. In its application, CW Ltd also submitted that

“As a [PLI] has taken place, any withheld information should be released as it is in the public interest and could have some impact on the case being considered. An approved wind farm has been severely delayed and held back ... and thus it is of serious concern to the general public, not just individuals, as it means that renewable energy generation has been delayed and Scottish Government targets have been missed.”

¹ <https://www.legislation.gov.uk/ukpga/1997/8/contents>

² <https://www.legislation.gov.uk/ukpga/1973/65/contents>

The Council's submissions

29. The Council explained in its response and review letters why on balance it had decided that the public interest would be best served by it having private space to consider internally all aspects of the planning process, as well as any associated legal considerations. It emphasised that this was particularly the case where the issue under consideration might be the subject of legal challenge and disclosure could place the Council at a disadvantage in any future legal proceedings. The Council recognised a general public interest in disclosure of environmental information, but commented to the effect that this can only happen if competing public interest arguments are not as strong.
30. The Council submitted that its decision making process was already being critiqued through the planning process, the planning appeal process and the PLI process. Evidence and information had been provided in this way. The PLI also included the cross-examination of participants and witnesses and was live-streamed on the internet. All planning decisions and rulings are made public, it continued, and the Council believed that the public interest was satisfied by these alternative means. In the Council's view, these processes already facilitated accountability and transparency, as well as providing an understanding, in proper context, of how particular decisions were reached.
31. The Council disagreed with CW Ltd's premise that the wind farm had been "severely delayed and held back due to delays orchestrated by the Council", as a basis for its public interest arguments. The Council stated it had taken enforcement action (Enforcement and Stop Notices) on CW Ltd and other relevant parties, in accordance with its statutory powers and obligations and to ensure appropriate compliance with – and application of – planning conditions. This, it contended, was in the interest of the public at large: the Council had a duty to defend CW Ltd's appeal of the Enforcement Notice based upon proper analysis of the planning merits of the case. The Council submitted that the arguments put forward by CW Ltd suggested the Council should not have pursued its statutory duties in taking enforcement action: on the contrary, it submitted that it had done this to fulfil its statutory functions as Planning Authority.
32. The Council also submitted that CW Ltd clearly had their own interest in obtaining the withheld information, for their own purposes, but that this did not transmit to the wider public interest: the public interest in maintaining this exception, in the Council's view, outweighed that in making the information available.

The Commissioner's view on public interest arguments

33. The Commissioner has considered all of these submissions carefully, alongside the withheld information (which he has accepted comprises internal communications for the purposes of this exception).
34. The Commissioner recognises the public interest in accountability and transparency with regard to the decision making processes of public authorities, and in understanding how particular decisions are reached. In this regard, the planning process itself and the PLI go a considerable way to serving this purpose, bearing in mind their inherent transparency. These are the proper statutory channels for scrutinising the Council's actions in this sphere and there is clearly a public interest in allowing them to run their course. In that context, it is not clear to the Commissioner how effective scrutiny of the Council's planning functions would be enhanced by disclosure of the withheld information in response to the request under consideration. Neither is it apparent how disclosure would contribute materially to effective scrutiny of the Council's financial position.

35. The Commissioner also accepts that there is a public interest in ensuring that legal advice (and other key professional advice, in a planning context) can be imparted freely and frankly, and options can be considered on a fully informed basis. This involves internal discussions and weighing up of the situation before deciding how to act. In the circumstances, he accepts that there would be genuine scope for the effectiveness of that process, including subsequent potential legal proceedings (of which the Commissioner accepts there remained a real prospect), being compromised by disclosure in the circumstances of this particular case.
36. In the particular circumstances of this case, the Commissioner concludes, on balance, that the public interest in making this information available is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs. Therefore, he considers the Council to have been justified in withholding the information under this exception.
37. As the Commissioner has concluded that all of the withheld information is excepted from disclosure under this exception, he has not gone on to consider the Council's application of the exception in regulation 10(5)(d) of the EIRs.

Decision

The Commissioner finds that, in respect of the matters specified in the application, East Ayrshire Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Community Windpower Ltd.

Appeal

Should either CW Ltd 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

23 August 2019

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;

...

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

5 Duty to make available environmental information on request

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

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...

10 Exceptions from duty to make environmental information available–

- (1) A Scottish public authority may refuse a request to make environmental information available if-
 - (a) there is an exception to disclosure under paragraphs (4) or (5); and
 - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that

...

- (e) the request involves making available internal communications.

...

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