



Scottish Information
Commissioner
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Decision Notice 043/2024

Quarry operated by Orkney Islands Council

Authority: Orkney Islands Council

Case Ref: 202200170

Summary

The Applicant asked the Authority for information about the quarry operated by it, in particular the output, the amount of stone used for its own purposes and the total cost of equipment and wages. The Authority disclosed some information, but refused to make other information available on the basis that it was commercially sensitive. The Commissioner investigated and found that the Authority had not been entitled to refuse to make the information available to the Applicant. He required the Authority to disclose the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “applicant” and “the Commissioner” and paragraphs (a), (b) and (c) of the definition of “environmental information”) (Interpretation); 5(1) and 2(b) (Duty to make environmental information available on request); 10(1) and (5)(e) (Exceptions from duty to make environmental information available) 17(1), (2)(a) and (b) (Enforcement and appeal provisions)

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 16 July 2021, the Applicant made a request for information to the Authority. They asked for:
 - a) The output from the Authority's quarry for each of the last 15 years for which figures were available;
 - b) The quantity of stone from the Authority's quarry that has been used for roads and its own other purposes for each of those 15 years;
 - c) The total cost of equipment and wages for the operation of the Authority's quarry for each of the last 15 years.
2. The Authority responded on 13 August 2021. In doing so, the Authority noted that the majority of the information requested by the Applicant was environmental (that covered by parts a) and b)). As such, the Authority processed and responded to these parts of the request under the Environmental Information (Scotland) Regulations 2004 (EIRs). Because the Authority did not consider the information covered by part c) to be environmental, it informed the Applicant that this part of the request was processed and responded to in line with the Freedom of Information (Scotland) Act 2002 (FOISA).
3. In its response, the Authority made some information available to the Applicant in response to part a) of the request, noting that it was only able to provide information for a ten-year period (up to 2019/2020). The Authority refused to make available or disclose information covered by the remaining parts of the request on the basis that it was confidential and commercial in nature and exempt from disclosure in line with the exception in regulation 10(5)(e) of the EIRs and the exemption in section 33 of FOISA respectively.
4. On 16 August 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that they were dissatisfied with the decision because they did not consider it reasonable for the Authority to withhold any information relating to the amount of quarried stone used for roads and other purposes over the ten-year period, for which overall total amounts have been provided. The Applicant also expressed dissatisfaction with the principle that appeared to be set where a public authority can spend public resources without quantifying them.
5. The Authority notified the Applicant of the outcome of its review on 13 September 2021. The Authority upheld its decision to refuse to make available or disclose information covered by parts b) and c) of the Applicant's request. It continued to rely on the exception in regulation 10(5)(e) of the EIRs for part b) of the request, and the exemption in section 33(1)(b) of FOISA for part c) of the request. In both cases, the Authority considered the information to be confidential and commercial in nature and that the effect of its release would allow competitors to undercut or cause a loss of business to the quarry.
6. In seeking to provide advice and assistance, in line with regulation 9 of the EIRs and section 15 of FOISA, the Authority informed the Applicant that it releases certain financial information in respect of its quarry operations. This information is released in its quarterly Budget Monitoring Reports. The Authority provided links to the two most recent reports and advised the Applicant to download the item entitled "Revenue Expenditure Monitoring".

7. On 8 February 2022, the Applicant wrote to the Commissioner, applying 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. The Applicant stated they were dissatisfied with the outcome of the Authority's review because:
 - they considered the public interest to lie in disclosure of the information.
 - they did not consider it reasonable for the Authority to withhold information relating to the amount of resources it uses for public infrastructure, paid for out of public funds.
 - they considered the public have a right to know how a public authority is choosing to spend public resources.
 - they did not consider it reasonable, or good practice, for a public authority to use public resources to undercut private providers of goods and services.

Investigation

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
9. On 8 March 2022, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority 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 Authority was invited to comment on this application and to answer specific questions. These related to why the Authority considered the information covered by parts b) and c) of the Applicant's request to be confidential and commercial in nature, together with why it considered release of that information would cause specific harm. Submissions were also sought around the Authority's consideration of the public interest test.

Commissioner's analysis and findings

11. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Handling of request

12. The Authority processed and responded to parts a) and b) of the Applicant's request under the EIRs, and part c) in line with FOISA.
13. Having considered the information covered by part c) of the request, which the Authority withheld, the Commissioner is of the view that because the total cost of equipment and wages incurred by the Authority in relation to the operation of the quarry directly relates to the work of the quarry (i.e. the extraction of stone and other materials), this would also come within the definition of environmental information in regulation 2(1) of the EIRs (in particular paragraphs (a), (b) and (c) of that definition).
14. During the course of the investigation, the Commissioner shared his view with the Authority. In response, the Authority submitted that if the Commissioner judged that the information covered by part c) of the request constitutes environmental information, it would continue to

argue that there is a possibility of substantial prejudice being caused to its legitimate economic interests in respect of quarry operations. It also stated that it would be able to transpose this argument and apply the exception in regulation 10(5)(e) of the EIRs. The Authority therefore concluded that it would maintain its position and argue the points around commercial sensitivity, even if part c) of the request is dealt with under the provisions of the EIRs.

Handling in terms of the EIRs

15. The Authority processed and responded to parts a) and b) of the Applicant's request and requirement for review in accordance with the EIRs.
16. Where information falls within the scope of the definition of "environmental information" in regulation 2(1) of the EIRs, a person has a right to access it (and the public authority a corresponding obligation to respond) under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
17. The Applicant has not challenged the Authority's decision to deal with the information covered by parts a) and b) of the request as environmental information. The Commissioner is satisfied that the information does comprise environmental information (see in particular paragraphs (a), (b) and (c) of the definition in regulation 2(1) of the EIRs).
18. As mentioned above, having considered the withheld information covered by part c) of the Applicant's request, the Commissioner is of the view that this would also come within the definition of environmental information in regulation 2(1) of the EIRs.
19. The Commissioner will, therefore, consider the handling of parts b) and c) of the Applicant's request in what follows solely in terms of the EIRs.

Regulation 5(1) – Duty to make environmental information available

20. 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 an applicant. The obligation relates to information that is held by the authority when it receives a request.
21. On receipt of a request for environmental information, therefore, an authority must ascertain what information it holds falling within 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)).
22. In response to the Applicant's requirement for review, the Authority relied on the exception in regulation 10(5)(e) of the EIRs for information covered by part b) of the Applicant's request. As mentioned above, during the course of the investigation, the Authority submitted that if the Commissioner did judge the information covered by part c) of the request to come within the definition of environmental information it would also rely on the same exception for refusing to make this available.
23. It is clear from the Applicant's application and submissions that they are unhappy with the Authority's reasons for refusing to make information available.

Regulation 10(5)(e) – Confidentiality of commercial or industrial information

24. 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.

25. As with all exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be disclosed 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)).
26. [The Aarhus Convention: an Implementation Guide](#), which offers guidance on the interpretation of convention from which the EIRs are derived, notes (at page 88) that the first test for considering this exception is whether national law protects the confidentiality of the withheld information. The law must explicitly protect that type of information as commercial or industrial secrets. Secondly, the confidentiality must protect a “legitimate economic interest”.
27. Having taken this guidance into consideration, the Commissioner’s view is 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 harm to a legitimate economic interest?

Is the information publicly available?

28. In part b) of the request, the Applicant asked for “*The quantity of stone from the [Authority’s] quarry that has been used for roads and other [Authority] purposes for each of the last 15 years?*”
29. In part c) of the request, the Applicant asked for “*The total cost of equipment and wages for the operation of the [Authority’s] quarry for each of the last 15 years?*”
30. In its submissions, the Authority explained that the withheld information would not ordinarily be published, unless there was a statutory basis for doing so. In this case, the Authority stated that there is no statutory basis for publication.
31. The Authority also stated that the information covered by part b) is not publicly available.
32. Information as to the nature of materials produced by the quarry, along with the cost to the public to purchase these materials is in the public domain. The Commissioner accepts that the withheld information is not, however, in the public domain. The Commissioner is also satisfied that the information which would fulfil part c) of the request is not available in the public domain.

Is the information commercial or industrial in nature?

33. The Authority argued that the quantity of stone from its own quarry, which has been used for roads and other purposes of its own for the last 15 years, is both commercial and industrial.
34. The Authority submitted that it is commercial information because, taken in conjunction with overall output figures (which were disclosed), it would allow competitors to ascertain enough information about the quarry’s business model to undercut or cause loss of business to the quarry.

35. The Authority asserted that the information is industrial in nature because the extraction of stone and the processing of some of that stone to produce asphalt fall within the definition of “industry” in the Oxford Dictionary: “economic activity concerned with the processing of raw materials”.
36. The Authority argued that information about the cost of equipment and wages for the operation of its quarry for each of the last 15 years was commercial and industrial in nature. This is because the quarry’s principal function is to supply the Authority and contractors fulfilling its contracts. The Authority noted that the supply of surplus products to the public is incidental to the principal function. Nevertheless, the Authority asserted that the quarry requires to be run in an economically viable manner in order to represent best value to the Authority. For that reason, the Authority submitted that the quarry operation constitutes an area in which it has commercial interests.
37. Having considered the withheld information, together with the submissions from the Authority, the Commissioner accepts that this information is commercial and industrial in nature.

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

38. In the Commissioner’s view, confidentiality “provided by law” will include confidentiality imposed on any person under the common law of confidence, under a contractual obligation or by statute.
39. The Authority contends that the Scots common law duty of confidence applies to the information covered by parts b) and c) of the request. The Authority commented that if the information is held in circumstances where it is expected that a duty of confidence applies, that information cannot normally be disclosed without the consent of the owner of the information.
40. As owner of the withheld information, the Authority explained that its employees are entrusted with confidential information and such information would not ordinarily be published, unless there is a statutory basis for doing so. In this case, the Authority commented that there is no statutory basis for publication.
41. The Commissioner has considered the withheld information, along with the submissions, and accepts that there does not appear to be any statutory requirement on the Authority to publish the information covered by parts b) and c) of the request. The Commissioner accepts the submission from the Authority that as the owner of the information it has imposed an implied duty of confidentiality on its employees in respect of this particular information, and it has not consented to disclosure of this for the purposes of responding to the Applicant’s request.
42. The Commissioner therefore accepts that an implied duty of confidence exists in relation to this information.

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

43. The term “legitimate interest” is not defined in the EIRs. In the Commissioner’s view, the interest in question should be financial, commercial or otherwise “economic” in nature. The prejudice to that interest must be substantial: in other words, it must be of real and demonstrable significance.

44. In its submissions, the Authority explained that the legitimate interest it is seeking to protect is the survival of Cursitar Quarry as a viable quarrying operation. Therefore, it is its own legitimate economic interest that it considered would be substantially harmed if the information was disclosed.
45. Within its submissions, the Authority has provided background information relating to quarrying on Orkney. Specifically, it noted that unlike most mainland local authorities, who have given up operating their own quarries (in the main due to the high cost of specialist investment and training when there are plenty of private sector quarries available which would guarantee competitive prices for road construction and maintenance materials), the situation in Orkney is different. In Orkney, there is only one other quarry operator, which is a private company.
46. As the largest developer in Orkney, as well as being the local roads authority, the Authority argued that if it did not operate its own quarry, there would be no competition and it would be charged whatever the private sector operator wanted to charge. The Authority therefore considers it imperative that it operates its own quarry to guarantee control over the cost and supply of materials for the various road construction, maintenance and drainage works it undertakes, as well as the cost for its contractors carrying out work on its behalf.
47. The Authority explained that it also has a duty to support the sustainable economic development of the local community. This would, it considered, be difficult and expensive to achieve, should there be no asphalt plant in Orkney and no competition for dry stone products.
48. The Authority submitted that it must ensure that its quarry operations are viable in order to secure Best Value in accordance with the Local Government in Scotland Act 2003.
49. It is the Authority's position that if the withheld information were to be disclosed this could then be utilised by its main competitor to examine the operation of the quarry, using information that would not be available to competitors if the quarry was a privately-run enterprise. The Authority considers this would particularly be the case in the context of information which is already publicly available, such as the overall output figures for the quarry and the price list for products. The Authority expressed concern that competitors would be able to piece together the Authority's business model with a view to establishing whether they can attempt to gain market share.
50. In the Authority's view, divulging further details of the quarry operation would therefore be likely to cause substantial harm to the legitimate economic interest of the survival of the quarry as a viable economic operation. This would, the Authority argued, jeopardise the affordability and deliverability of its future projects and its role in supporting the future economic viability of its communities.
51. The Commissioner has carefully considered the arguments advanced, along with the withheld information.
52. The Commissioner accepts that the Authority does have a legitimate economic interest in relation to the withheld information.
53. The specific information requested by the Applicant in part b) of his request is the quantity of stone from the Authority's quarry which has been used for roads and other purposes by the Authority for each of the last 15 years. The Commissioner is unable to accept that disclosure of this information would enable a competitor to examine the operation of the

quarry and jeopardise its economic viability, and the affordability and deliverability of future projects carried out by the Authority.

54. It is the Commissioner's view that more factors would need to come into play before competitors could ascertain sufficient information about the operation of the quarry to have the impact and effect described by the Authority. For instance, it would be necessary for any competitor to know exactly how much stone or product the Authority would need in any given month or year to complete its projects, together with the variation of the product(s) concerned. Any competitor would also have to be aware of not just how much the Authority charges the public for private sales of stone and other products, but also how much it charges itself for each product and in what quantity. Without that additional information, a competitor would have an incomplete picture.
55. Similarly, in relation to the information covered by part c) of the request, any competitor would have to know much more information than just a total cost to be able to undercut the Authority's business model to gain market share, or lead to a loss of business for the quarry. For example, a competitor would have to be aware of how many staff were employed by the Authority at the quarry, what salary grade each of these staff was on and what the hourly rate was for each employee. Any competitor would also need to ascertain the type and quantity of machinery/equipment used at the quarry along with any upkeep and maintenance costs, as well as knowing the hours in which the quarry operates. The Commissioner is not satisfied that it is possible to ascertain this information from the withheld information.
56. For these reasons, the Commissioner cannot agree with the Authority that the substantial prejudice it considers would occur to its own economic interests would result, or would be likely to result, as a consequence of the disclosure of the withheld information in response to this request.
57. In conclusion, the Commissioner is not satisfied that disclosure of the withheld information (which would fulfil parts b) and c) of the request) relating to the quantity of stone used by the Authority from the quarry, and the total cost of equipment and wages, for each of the last 15 years would, or would be likely to, cause the substantial prejudice required by regulation 10(5)(e). Consequently, he cannot accept that the Authority can justify the application of the exception in regulation 10(5)(e) to the withheld information.
58. Given that the Commissioner has found that the exemption in regulation 10(5)(e) was incorrectly applied to the information withheld by the Authority, the Commissioner is not obliged to, and has not gone on to, consider the public interest test required by regulation 10(1)(b) of the EIRs.
59. The Commissioner finds that, by not making the information available, the Authority failed to comply with regulation 5(1) of the EIRs. He requires the Authority to disclose the information to the Applicant.

Decision

The Commissioner finds that the Authority failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

By failing to identify information covered by part c) of the Applicant's request as Environmental Information for the purposes of the EIRs, the Authority failed to comply with regulation 5(1) of the EIRs.

The Commissioner also finds that the Authority had not been entitled to rely on the exception in regulation 10(5)(e) of the EIRs for refusing to make information available which would fulfil parts b) and c) of the Applicant's request.

The Commissioner therefore requires the Authority to make available to the Applicant the recorded information held which fulfils parts b) and c) of their request by **6 May 2024**.

Appeal

Should either the Applicant or the Authority 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.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

David Hamilton
Scottish Information Commissioner

22 March 2024

Appendix 1: 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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
 - (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.
- (2) An application under subsection (1) must -
 - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);
and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

- (1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

“applicant” means any person who requests that environmental information be made available;

“the Commissioner” means the Scottish Information Commissioner constituted by section 42 of the Act;

...

"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.

...

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.

...

(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;

...

17 Enforcement and appeal provisions

- (1) The provisions of Part 4 of the Act (Enforcement) including schedule 3 (powers of entry and inspection), shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in paragraph (2).

- (2) In the application of any provision of the Act by paragraph (1) any reference to -

- (a) the Act is deemed to be a reference to these Regulations;
- (b) the requirements of Part 1 of the Act is deemed to be a reference to the requirements of these Regulations;

...

- (f) a notice under section 21(5) or (9) (review by a Scottish public authority) of the Act is deemed to be a reference to a notice under regulation 16(4); and

...