



Decision Notice 139/2024

Tender documents

Authority: Angus Council

Case Ref: 202400208

Summary

The Applicant asked the Authority for all tender documents submitted by Urban Foresight for a contract for a Levelling Up Project to develop Monikie and Crombie country parks. The Authority considered the request under FOISA and withheld the information requested on the basis that it was commercially sensitive. The Commissioner investigated and found that the Authority had considered the request under the wrong legislation. The requested information was environmental information and the Authority should have considered the request under the EIRs. The Commissioner required the Authority to respond to the request under the EIRs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 33(1)(b) (Commercial interest and the economy); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “the applicant”, “the Commissioner” and (paragraphs (a), (b) and (c) of definition of “environmental information”) (Interpretation); 5(1) (Duty to make available environmental information on request); 16 (Review by Scottish public authority); 17(1), (2)(a), (b) and (f) (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 29 November 2023, the Applicant made a request for information to the Authority. The Applicant asked for all tender documents submitted by Urban Foresight for [the contract](#)¹ for the Angus Levelling Up Project to develop Monikie and Crombie country parks.
2. The Authority responded on 17 January 2024. The Authority refused the request under section 33(1)(b) of FOISA on the basis that the tender documents contained information subject to commercial confidentiality, disclosure of which could cause substantial prejudice to Urban Foresight.
3. On 21 January 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because:
 - he considered the justification used by the Authority was weak given that the invitation to tender documentation advised those submitting responses that any information provided would be subject to the Authority's obligations under law, including FOISA
 - he did not believe that the Authority had demonstrated that disclosure would cause substantial harm
 - the Authority had not adequately considered the public interest in disclosing the information.
4. The Authority notified the Applicant of the outcome of its review on 1 February 2024, fully upholding its original decision. The Authority also provided further arguments detailing its consideration of the public interest test.
5. On 11 February 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review because he disagreed with the exemption applied and, in any case, the public interest test favoured disclosure.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 27 February 2024, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and asked it to send the information withheld from the Applicant.
8. The Authority provided the Commissioner with the withheld information and the case was subsequently allocated to an investigating officer.
9. The Authority was invited to comment on the Application and to answer specific questions, including whether it considered the information requested was environmental information.

¹ [View Notice - Public Contracts Scotland](#)

Commissioner's analysis and findings

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

FOISA or EIRs?

11. The relationship between FOISA and the EIRs was considered at length in [Decision 218/2007](#)². Broadly, in the light of that decision, the Commissioner's general position is as follows:
 - (i) The definition of what constitutes environmental information should not be viewed narrowly.
 - (ii) There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
 - (iii) Any request for environmental information therefore must be handled under the EIRs.
 - (iv) In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
 - (v) If the authority does not choose to claim the section 39(2) exemption, it must respond to the request fully under FOISA: by providing the information; withholding it under another exemption in Part 2; or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these).
 - (vi) Where the Commissioner considers a request for environmental information has not been handled under the EIRs, he is entitled (and indeed obliged) to consider how it should have been handled under that regime.
12. As rehearsed earlier, given the subject matter of the request, the Commissioner asked the Authority to consider whether the request properly fell to be handled as a request for environmental information, and therefore responded to under the EIRs.
13. The Authority did not agree that the request fell to be considered under the EIRs and responded solely under FOISA.
14. The Authority explained that the information requested directly related to the procurement and tendering process of a contract. The Authority accepted that the work intended to be carried out would fall under the definition of environmental information in regulation 2(1) of the EIRs. However, the Authority maintained that the information requested falls outwith that definition (and should be considered under FOISA) as it is a regulated and highly competitive process preceding any environmental outcome.
15. Although the information in question precedes an environmental outcome, the Commissioner considers the project for which the tender documents were submitted (the development of Monikie and Crombie country parks) to be, in its entirety, a measure affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) of the definition of

² <https://www.foi.scot/decision-2182007>

environmental information in regulation 2(1) of the EIRs, and therefore to fall within paragraph (c) of that definition. Consequently, he considers the information requested to comprise, in its entirety, environmental information (as he did in [Decision 107/2010](#)³, which also considered tender documents).

16. Given that the information requested is environmental information, the Authority had a duty to consider it in terms of regulation 5(1) of the EIRs. In failing to do so, it failed to comply with regulation 5(1).

Section 39(2) of FOISA - environmental information

17. 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.
18. In this case, as stated above, the Authority did not agree that the request fell to be considered under the EIRs and instead responded solely under FOISA.
19. The Commissioner finds that the Authority would have been entitled to apply this exemption to the request, given his conclusion that the information requested was properly classified as environmental information.
20. As there is a separate statutory right of access to environmental information available to the Applicant, the Commissioner also accepts that, in this case, the public interest in maintaining this exemption and in handling the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.

Regulation 16 of the EIRs

21. Regulation 16 of the EIRs states that, on receipt of a requirement to conduct a review, the authority shall review the matter and decide whether it has complied with the EIRs, within 20 working days (regulations 16(3) and (4)). It also states that, where an authority has not complied with its duty under the EIRs, it shall immediately take steps to remedy the breach of duty (regulation 16(5)).
22. Although the Authority responded to the Applicant's requirement for review on 1 February 2024, as explained above, this was a result of the Authority considering the request solely in terms of FOISA and not under the EIRs.
23. It is apparent that the Authority failed to respond to the Applicant's request of 29 November 2023 in terms of the EIRs, and therefore failed to comply with regulation 5(1) of the EIRs. It is also apparent that the Authority failed to carry out a review meeting the requirements of regulation 16 of the EIRs.
24. The Commissioner therefore requires the Authority to provide a response to the Applicant's requirement for review of 21 January 2024 in terms of regulation 16 of the EIRs.
25. The Commissioner's decision below states a compliance date of 5 August 2024, in line with the timescales he is required to follow. This is the latest day on which the Authority must issue a response: the deadline does not prevent the Authority from issuing one sooner.

³ <https://www.foi.scot/decision-1072010>

Decision

The Commissioner finds that the Authority failed to comply with the requirements of regulations 5(1) and 16 of the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the Applicant's information request and requirement for review.

The Commissioner requires the Authority to provide a response to the Applicant's requirement for review, in terms of regulation 16 of the EIRs, by 5 August 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

21 June 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.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - ...
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- ...

33 Commercial interests and the economy

- (1) Information is exempt information if-
 - ...
 - (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).
- ...

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
 - (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.

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

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(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.

...

16 Review by Scottish public authority

(1) Subject to paragraph (2), an applicant may make representations to a Scottish public authority if it appears to the applicant that the authority has not complied with any requirement of these Regulations in relation to the applicant's request.

(2) Representations under paragraph (1) shall be made in writing to the Scottish public authority no later than 40 working days after either the date that the applicant receives any decision or notification which the applicant believes does not comply with these Regulations or the date by which such a decision or notification should have been made, or any other action should have been taken, by the authority but was not made or taken.

(3) The Scottish public authority shall on receipt of such representations-

- (a) consider them and any supporting evidence produced by the applicant; and
 - (b) review the matter and decide whether it has complied with these Regulations.
- (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.
- (5) Where the Scottish public authority decides that it has not complied with its duty under these Regulations, it shall immediately take steps to remedy the breach of duty.

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
 - ...