

Decision Notice



Decision 025/2009 Iain Hogg and Scottish Environment Protection Agency

Correspondence relating to a farm

Reference No: 200801702
Decision Date: 6 March 2009

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Kevin Dunion
Scottish Information Commissioner

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Summary

Mr Iain Hogg requested from the Scottish Environmental protection Agency (SEPA) copies of correspondence relating to Tippetcraig Farm. SEPA responded by stating that the information was exempt in terms of section 39(2) of FOISA (on the basis that it was environmental information and therefore subject to the EIRs) and withheld under regulation 10(5)(b) of the EIRs in that disclosure of the information would or would be likely to prejudice a fair trial. Following a review, during which some information was released, Mr Hogg remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which SEPA released the information requested, the Commissioner found that SEPA had dealt with Mr Hogg's request for information in accordance with Part 1 of FOISA by applying section 39(2) on the basis that the information requested was environmental information and therefore subject to the EIRs. He also found, however, that he could not uphold SEPA's application of regulation 10(5)(b) of the EIRs in withholding the information which SEPA had subsequently released. He did not require SEPA to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions) and 39(2) (Health, Safety and the Environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation – definition of environmental information); 5(1) and (2) (Duty to make environmental information available on request) and 10(1), (2)(b) and (5)(b) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 6 August 2008, Mr Hogg wrote to SEPA requesting copies of correspondence referring to himself and /or The Deanston Partnership and relating to Tippetcraig Farm.



2. SEPA responded on 18 August 2008, confirming that it held information which fell within the scope of Mr Hogg's request. It stated that it had applied the exemption under section 39(2) of FOISA, as it considered the requested information to be environmental information as defined by regulation 2(1) of the EIRs. SEPA informed Mr Hogg that the information held was excepted information in terms of regulation 10(5)(b) of the EIRs, in that to place the information in the public domain would potentially prejudice a fair trial.
3. On 15 September 2008, Mr Hogg wrote to SEPA requesting a review of its decision to withhold the information under regulation 10(5)(b). In particular, Mr Hogg drew SEPA's attention to European case law supporting (on grounds of fairness) disclosure to the defence of material in the possession of the prosecution.
4. SEPA notified Mr Hogg of the outcome of its review on 9 October 2008. SEPA provided Mr Hogg with certain information while otherwise upholding its earlier decision to withhold, the remaining information being related to ongoing legal proceedings concerning Tippetcraig Farm. It took the view that an active judicial process was under way, which was capable of being prejudiced by disclosure.
5. In this response, SEPA also made reference to regulation 9 of the EIRs, which provides that a Scottish public authority has a duty to provide reasonable advice and assistance to applicants and prospective applicants. In this regard, SEPA informed Mr Hogg that it had contacted the Crown Office and Procurator Fiscal Service (COPFS) to find out if there was an alternative means by which Mr Hogg could access information relating to the ongoing proceedings. COPFS had indicated that Mr Hogg could contact the Falkirk Office and was provided with a reference number and contact details.
6. On 11 November 2008, Mr Hogg wrote to the Commissioner, stating that he was dissatisfied with the outcome of SEPA's review and applying 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 certain specified modifications.
7. The application was validated by establishing that Mr Hogg had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

8. On 27 November 2008, SEPA was notified in writing that an application had been received from Mr Hogg and asked to provide the Commissioner with any information withheld from him. SEPA responded with the information requested and the case was then allocated to an investigating officer.



9. The investigating officer subsequently contacted SEPA, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, SEPA was asked to justify its reliance on the provisions of regulation 10(5)(b) of the EIRs in relation to the information withheld from Mr Hogg.
10. During the investigation, the investigating officer drew to SEPA's attention that some of the withheld information was also held by other Scottish public authorities, and also noted that the information was not held by SEPA in connection with an investigation it had instigated or carried out. It was therefore suggested that SEPA might wish to consult with the other public authorities involved in the investigation and, in particular, COPFS.
11. SEPA responded by confirming it would consult with the other public authorities and in particular was in correspondence with the Procurator Fiscal at Falkirk to ascertain whether the information could be released. In this regard, SEPA confirmed that it had forwarded all of the withheld information to the Procurator Fiscal (who did not appear to have had sight of it earlier) for consideration.
12. On 19 January 2009, SEPA (having consulted with the relevant third parties) wrote to Mr Hogg and released the withheld information.
13. Having received the information requested, Mr Hogg indicated that he still wished a decision by the Commissioner on SEPA's handling of his request for information. Some of Mr Hogg's comments and questions were outwith the remit of the Commissioner, who by law is restricted to considering Mr Hogg's request for information as contained in his letter of 6 August 2008 and whether SEPA dealt with that request in accordance with Part 1 of FOISA and the EIRs.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Hogg and SEPA and is satisfied that no matter of relevance has been overlooked.
15. SEPA dealt with Mr Hogg's request on the basis that the information requested was environmental information as defined in regulation 2(1) of the EIRs, which is reproduced in the Appendix below. Given that the information requested relates to development on a Site of Special Scientific Interest and proposed Special Protection Area for the conservation of wild birds, the Commissioner is satisfied that it falls within the definition of environmental information set out in regulation 2(1), in particular regulation 2(1)(c) concerning measures and activities affecting or likely to affect the elements of the environment (which include land and landscape).



Section 39(2) of FOISA – environmental information

16. Essentially, the exemption in section 39(2) of FOISA provides that environmental information as defined by regulation 2(1) of the EIRs is exempt information under FOISA (thereby allowing any such information to be considered solely in terms of the EIRs), subject to the public interest test in section 2(1)(b) of FOISA. In this case the Commissioner accepts that SEPA was correct to apply the exemption to the withheld information as environmental information. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA.

Regulation 10(5)(b) of the EIRs

17. Regulation 10(5)(b) of the EIRs states:

"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 course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature."

18. In determining whether the withheld information would fall within the scope of this exception, the Commissioner has been mindful of the explanation given in *The Aarhus Convention: An Implementation Guide*, where the principles behind the convention provision on which the exemption is based are set out in the following way (page 59):

"The course of justice refers to active proceedings within the courts. The term 'in the course of' implies that an active judicial procedure capable of being prejudiced must be under way. This exception does not apply to material simply because at one time it was part of a court case. Public authorities can also refuse to release information if it would adversely affect the ability of a person to receive a fair trial. This provision should be interpreted in the context of the law pertaining to the rights of the accused."

19. Although there is no definition within the EIRs as to what would constitute substantial prejudice, it is the Commissioner's view that in order for a public authority to be able to rely on this exception it would have to show that the risk of damage being caused by disclosing the information was real or very likely, not hypothetical. The harm caused would have to be significant, not marginal, and it would have to occur in the near (certainly the foreseeable) future and not in some distant time.
20. SEPA intimated that, at the time of the review, it had contacted Central Scotland Police, who confirmed that the events in question were the subject of ongoing court proceedings. Therefore, it took the view that the exception under regulation 10(5)(b) of the EIRs was sustainable.



21. While the Commissioner accepts that the withheld information could have been considered as information pertaining to ongoing criminal proceedings, the deciding factor as to whether information is exempted in terms of regulation 10(5)(b) is whether making it available would, or would be likely to, prejudice substantially the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature.
22. Taking account of the submissions made by SEPA, and the content of the information withheld (and subsequently released), the Commissioner is not persuaded that the release of the information would or would be likely to cause substantial prejudice as outlined above. The information relates to the professional views of officers in the relevant authorities as to the application of certain statutory requirements to the development in question. The Commissioner notes that some of this information had been obtained by Mr Hogg from other authorities and overall can identify no element of it which would in the circumstances have been capable of causing (or would have been likely to have caused) substantial prejudice to any of the interests identified in the regulation 10(5)(b) exemption. This is a position which appears to be accepted by SEPA, which agrees that had the third party consultations taken place at the time of the review the information could have been released at that stage.
23. Consequently, the Commissioner does not uphold SEPA's application of regulation 10(5)(b) of the EIRs to the information withheld. Since during the investigation SEPA released the information requested, the Commissioner does not require it to take any further action in response to Mr Hogg's application.

DECISION

The Commissioner finds that the Scottish Environmental Protection Agency (SEPA) acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Hogg by withholding the information in terms of section 39(2) of FOISA.

However, the Commissioner also finds that SEPA failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in not making the information requested available in accordance with regulation 5(1) of the EIRs. In particular, the Commissioner finds that the information withheld could not properly be refused under the exception in regulation 10(5)(b) of the EIRs.

Given that the information was released during the investigation, the Commissioner does not require SEPA to take any action in response to this failure.

Decision 025/2009
Mr Iain Hogg
and the Scottish Environment Protection Agency



Appeal

Should either Mr Hogg or the Scottish Environment Protection Agency wish to appeal against this decision, there is an 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 notice.

Margaret Keyse
Head of Enforcement
6 March 2009



Appendix

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.

...

- (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.

...

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.



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;
- (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;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (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.

...

- (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-

...

- (b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;

...