

Decision Notice

Decision 070/2018: Mr Guy Kerry and Highland Council

Council's position on land access / privacy at a specified location

Reference No: 201800138

Decision Date: 22 May 2018



Scottish Information
Commissioner

Summary

The Council was asked for information confirming its position with regard to “privacy” under access legislation over land termed as “excluded”.

The Council responded by referring to an earlier communication which, it stated, set out its position. Upholding that position, the Council explained, at review, that it was required to interpret legislation on a case-by-case basis and did not hold a definition of “excluded land”. The applicant remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had responded to the request for information in accordance with the EIRs. He did not require the Council to take any action.

Relevant statutory provisions

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

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 available environmental information on request); 9(1) and (3) (Duty to provide advice and assistance)

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 12 December 2017, Mr Kerry made a request for information to Highland Council (the Council). The information requested was:

The Council's Access Officer declared in a communication with Gairloch Community Council that “privacy” under access legislation can be claimed by those living at Rua Reidh Lighthouse over land which he terms “excluded”. He defines “excluded” land as land which the residents “own and manage”.

Please let me have the information you hold which demonstrates, clearly, whether the Council still agrees with and adheres to those definitions or if the Council has resiled from the position set out by the Access Officer.

If the Council has resiled from the position set out by the Access Officer, please let me have the information you hold which clearly sets out your current position which replaces the Access Officer's former definitions.

If you do not understand this request please give me your help and assistance, as is your duty under FOI legislation, so that I can obtain the information I am entitled to.

2. The Council responded on 20 December 2017. It applied the exemption in section 39(2) (Health, safety and the environment) of FOISA and considered the request under the EIRs.

The Council referred Mr Kerry to an earlier response issued to him on 8 December 2017 and informed him that its position remained as per that response.

3. On 20 December 2017, Mr Kerry wrote to the Council, requesting a review of its decision. He submitted that the earlier response referred to by the Council dealt with ownership, access and Roads Act issues, but did not touch on the Access Officer's definition of "excluded land". Mr Kerry was not satisfied that the Council's response had provided the information requested. Mr Kerry contended that the Council appeared to have altered some of its previously held views and, as such, it was difficult to understand which definition the Council was working to. Mr Kerry asked the Council to provide him with advice and assistance to allow him to access the specific information he was seeking.
4. The Council notified Mr Kerry of the outcome of its review on 19 January 2018, upholding its original decision with modification. It explained that it had previously attempted to assist Mr Kerry by explaining the terms of the Land Reform Act and how the Council had to interpret its application on a case-by-case basis, depending upon the specific circumstances of the land dispute in question. The Council informed Mr Kerry that it did not have a definition of "excluded land" but had provided explanations of its use, as dictated by the legislation, to a number of parties, including Mr Kerry. The Council confirmed that the Access Officer had not changed position and apologised if, in its attempt to explain the situation, it had given this impression.
5. On 21 January 2018, Mr Kerry 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. Mr Kerry stated he was dissatisfied with the outcome of the Council's review because it contained no information about whether the Council had resiled from the Access Officer's definition. He also considered the response confusing. Mr Kerry did not believe he had been given the necessary advice and assistance to allow him to understand the Council's position, nor did he believe he had been given all the information the Council held on this matter.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Kerry 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 21 February 2018 the Council was notified in writing that Mr Kerry had made a valid application 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. These focused on the searches the Council had undertaken to identify, locate and retrieve any relevant information, and what advice and assistance the Council had given to Mr Kerry in handling his request.
9. Mr Kerry was asked to provide the investigating officer with copies of the correspondence referred to in his request (namely the communication between the Access Officer and Gairloch Community Council) and of the earlier communication referred to by the Council in its initial response.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all of the relevant submissions, or parts of submissions, made to him by both Mr Kerry and the Council. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

11. It is clear from the terms of the request that the information caught by it would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question relates to rights of access to land, and as such, the Commissioner is satisfied that it would fall within paragraphs (a), (c) and (f) of the definition of environmental information (reproduced in Appendix 1).
12. In *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹, the Commissioner confirmed (at paragraph 51) that where environmental information is concerned, there are two separate statutory frameworks for access to that information and, in terms of the legislation, an authority is required to consider the request under both FOISA and EIRs.

Section 39(2) of FOISA – Environmental information

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 this exemption to the information caught by the request, given his conclusion that it is properly classified as environmental information.
14. 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 in dealing with the request in line with the requirements of the EIRs outweighs any public interest in dealing with the request under FOISA.
15. Accordingly, the Commissioner will consider the information in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs

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 that is held by the authority when it receives a request.
17. The standard of proof in considering whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held. While it may be relevant as part of this exercise to explore what information should be held, ultimately the Commissioner's role is to determine what relevant information is (or was, at the time the request was received) held by the public authority.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200600654.aspx>

Has all relevant information been identified?

18. In his application to the Commissioner, Mr Kerry was dissatisfied that the Council had not disclosed all the information it held. He submitted that its review outcome was confusing. He explained that he was trying to establish what the Council's position was where residents claimed "privacy" under the Land Reform (Scotland) Act 2003 (the Land Reform Act). He was particularly concerned about a particular area of land, which he understood the Access Officer to have taken a particular view on, with regard to ownership and management. Mr Kerry contended that the position claimed by the Council's Access Officer differed from that held by the Council itself, which appeared to him to deny the relevance of ownership or management, and so it was difficult to understand what the Council's position actually was.
19. In its submissions to the Commissioner, the Council explained that Mr Kerry's request related to public access at a specified location. It outlined the situation, explaining that the Land Reform Act provides a general right of access to land in Scotland, but also requires that people make use of this right in a reasonable and responsible way. The Land Reform Act, it continued, recognises the right to privacy around dwellings and, while a particular owner or occupier may not demand this privacy, it does not mean that the right to privacy does not exist.
20. Where there are issues regarding privacy and access rights, the Council explained that it would hope to be able to establish a reasonable compromise between the right to privacy and the right to roam. It recognised, however, that only a court could enforce either right, or decide which land is covered by the right to privacy in a specific location. The Council confirmed this had previously been explained to Mr Kerry.
21. The Council went on to explain that it is required to interpret the Land Reform Act in relation to access issues. This legislation, together with the Scottish Outdoor Access Code, provides the basis upon which Council staff consider a situation and decide on what, in their opinion, would be reasonable. Much of this, the Council submitted, depends on the surrounding landscape and factors such as locations of paths and roads, and the proximity to the area of interest. As such, the Council confirmed it held no definition of "excluded land".
22. The Council explained that staff had, on a number of occasions, attempted to describe the criteria which would be taken into account in forming a conclusion on this matter, both to Mr Kerry and to other members of the community. In the Council's view, the provision of multiple explanations – depending on the circumstances at the time – had led to Mr Kerry interpreting these as the Council "changing its definition".
23. The Council maintained that there was no definition, only interpretation and explanation. It confirmed that its position was that set out in its letter to Mr Kerry dated 8 December 2017, referred to in its initial response.
24. The Council informed the Commissioner that, given it held no definition of "excluded land", and in light of previous correspondence, it considered there was no need to conduct any searches in this case. It confirmed that Mr Kerry had been provided with all the information it held on this issue.

The Commissioner's conclusions

25. The Commissioner's remit under FOISA and the EIRs is to investigate and reach a determination on recorded information, if held. He cannot consider the wider issue of whether the Council and/or any of its staff are adhering to the same definitions on a particular point. Equally, the underlying dispute in this case is not the Commissioner's concern.

26. Having considered all relevant submissions and the terms of the request, the Commissioner notes that Mr Kerry is seeking information confirming what the Council's position is on this particular matter. The Commissioner is satisfied that the Council took adequate, proportionate steps in the circumstances to establish what information it held, falling within the scope Mr Kerry's request. While it may be going too far to say that there were no relevant searches the Council could have undertaken, the Commissioner has considered the Council's explanations fully and accepts that any searches conducted would be highly unlikely to locate any further information to that already disclosed (i.e. that setting out the Council's position, as per the letter of 8 December 2017).
27. The Commissioner is therefore satisfied, on the balance of probabilities, that the Council identified, located and provided all of the relevant information it held when responding to Mr Kerry's request and so complied with regulation 5(1) of the EIRs.
28. As stated in many previous decisions, the Commissioner's remit extends only to consideration of whether a Scottish public authority actually holds the requested information and whether it has complied with regulation 5(1) of the EIRs. The Commissioner cannot comment on whether the Council ought to hold more information, in particular as to its own definition of "excluded land", as Mr Kerry appears to expect: all he can say is that, on the basis of the submissions he has received, it is unlikely that it would.

Regulation 9(1) of the EIRs

29. Regulation 9(1) of the EIRs requires a Scottish public authority, so far as it is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it. The Scottish Ministers' Code of Practice on the discharge of functions by Scottish Public Authorities under FOISA and the EIRs² ("the Section 60 Code") gives guidance to authorities on providing such advice and assistance.
30. The Section 60 Code states, at paragraph 5.1.1 in Part 2:
"Authorities have a duty to provide advice and assistance at all stages of a request. It can be given either before a request is made, or to clarify what information an applicant wants after a request has been made, whilst the authority is handling the request, or after it has responded."
31. In his application to the Commissioner, Mr Kerry was dissatisfied that he had not been provided with adequate advice and assistance to allow him to understand what the Council's position was.
32. The Council submitted that it had attempted to provide Mr Kerry with advice and assistance in relation to this matter over the period since the access issue arose. It provided copies of correspondence in evidence of this. These included:
 - The letter dated 8 December 2017 to Mr Kerry (referred to above) which, inter alia, provided information on the privacy issue and set out the Council's position.
 - The Council's response dated 24 April 2017 to a previous information request by Mr Kerry which, the Council submitted, clearly explained the legislation (the Land Reform Act 2003 (section 6(1)(b)(iv), read with the Scottish Outdoor Access Code (section 3.13-17)) with regard to privacy.

² <http://www.gov.scot/Resource/0051/00510851.pdf>

- An email to Gairloch Community Council dated 8 March 2017, in which the Council's Access Officer attempted to address the privacy issue (disclosed with the Council's response of 24 April 2017 to a previous information request by Mr Kerry).
 - An email dated 2 August 2016 to Mr Kerry, in which the Council's Access Officer explained he was looking into the matter of sufficient adjacent land for privacy.
 - An email dated 27 April 2016 to a local journalist (previously disclosed to Mr Kerry in response to a separate information request), in which the Council's Access Officer addressed access rights.
33. The Council maintained that its position was based on interpretation of the legislation and the Scottish Outdoor Access Code. It submitted that it had attempted to explain the right to privacy to Mr Kerry on a number of occasions, but only a court could decide whether the Council was correct and what area of land this privacy could reasonably cover. The Council considered the letter of 8 December 2017 clearly set out its position.
34. In light of previous correspondence, the Council took the view that it did not appear that any further advice and assistance could be given to Mr Kerry, to allow him to understand what its position was.
35. In this case, and taking into account the information and explanations provided to Mr Kerry by the Council (including those in the Council's review outcome), the Commissioner does not accept that the Council failed to comply with regulation 9(1) of the EIRs in responding to Mr Kerry's request. Mr Kerry is clearly unhappy with the Council's handling of the underlying issue, but that cannot – as indicated above – be a matter for the Commissioner.

Decision

The Commissioner finds that Highland Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr Kerry.

Appeal

Should either Mr Kerry or Highland 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

22 May 2018

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;

...

(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.

...

9 Duty to provide advice and assistance

(1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...

(3) To the extent that a Scottish public authority conforms to a code of practice under regulation 18 in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with the duty imposed by paragraph (1) in relation to that case.

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