

Decision Notice



Decision 089/2014 Ms Susan Crosthwaite and the Scottish Ministers

Environmental Impact Assessment

Reference No: 201400155
Decision Date: 24 April 2014

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Rosemary Agnew
Scottish Information Commissioner

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Summary

On 11 November 2013, Ms Crosthwaite asked the Scottish Ministers (the Ministers) for an Environmental Impact Assessment (EIA) for a wind farm planning application. Ms Crosthwaite was not satisfied that the Ministers did not hold the information, believing that they were legally required to carry out an EIA. After investigation, the Commissioner accepted that the Ministers did not hold this information.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definition (a) to (c) of “environmental information”); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1) and (4)(a) (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 11 November 2013, Ms Crosthwaite wrote to the Ministers requesting a copy of the Ministers “independent Environmental Impact Assessment” (EIA) relating to a specific wind farm planning application, and supporting environmental information. In the event that the supporting environmental information had already been made publicly available, she asked the Ministers to confirm this. Ms Crosthwaite also asked for the methodology that would be used to produce the EIA.
2. The Ministers responded on 13 December 2013. They stated that they did not hold the information she had requested, and explained why they were not required to complete their own independent EIA.
3. On 19 December 2013, Ms Crosthwaite wrote to the Ministers requesting a review of their decision on the grounds that she understood that the Ministers were legally obliged to produce an EIA.



4. The Ministers notified Ms Crosthwaite of the outcome of their review on 20 January 2014. The Ministers confirmed that they did not hold the information she had asked for. They acknowledged that their original response had failed to make reference to the relevant regulation under the EIRs. They confirmed their decision was that Ms Crosthwaite's request should be refused under the exception in regulation 10(4)(a) of the EIRs as the Scottish Government did not hold the information.
5. On 21 January 2014, Ms Crosthwaite wrote to the Commissioner, stating that she was dissatisfied with the outcome of the Ministers' 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 specified modifications.
6. The application was validated by establishing that Ms Crosthwaite made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

7. On 20 February 2014, the Ministers were notified in writing that an application had been received from Ms Crosthwaite, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. The Ministers were asked to give details of any searches carried out for the information requested and explain their reliance on regulation 10(4)(a) of the EIRs.
8. The Ministers provided their response and comment to the Commissioner on 6 March 2014.
9. The submissions received from both the Ministers and Ms Crosthwaite are considered fully in the Commissioner's analysis and findings below.

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 her by both Ms Crosthwaite and the Ministers. She is satisfied that no matter of relevance has been overlooked.



Regulation 5(1) of the EIRs

11. Regulation 5(1) of the EIRs (subject to 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. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request (as opposed to information an applicant believes the authority should hold, but which is not in fact held).
12. 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 outweigh(s) the public interest in making the information available. In this case, the outcome of the Ministers' review was that the exception in regulation 10(4)(a) applied.

Regulation 10(4)(a) (information not held)

13. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received.
14. Ms Crosthwaite explained in her correspondence with the Ministers why she thought they were legally obliged to complete an EIA in order to justify a decision on a wind farm.
15. In their correspondence with Ms Crosthwaite, the Ministers referred to paragraphs 4 and 8 of the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2000 (as amended) to support their view that they were not required to carry out an EIA.
16. In their submissions to the Commissioner, the Ministers reiterated that they have not and will not complete an independent EIA on this wind farm. They argued that, as the Scottish Government's role in the overall assessment has not yet been undertaken, there was no need to search for information falling within the scope of Ms Crosthwaite's request. They explained that the Ministers had not yet come to a view on the Environmental Statement prepared by the wind farm developer, as well as other environmental information including consultation responses and other representations.
17. The Ministers explained that all wind farm developers produce an Environmental Statement (ES) which is then subject to a consultation process which will involve the relevant planning authority (typically the local authority), Scottish Natural Heritage and the Scottish Environmental Protection Agency. In this case, the wind farm developer had produced an ES which was made available to the public by South Ayrshire Council, at its offices and in Maybole Library. The ES was also available for viewing at the Scottish Government Library in Victoria Quay, Edinburgh.



18. On the evidence of the Ministers' submissions, the Commissioner is satisfied that no EIA was compiled or held by the Ministers and that the exception in regulation 10(4)(a) applies. She acknowledges Ms Crosthwaite's belief that the Ministers have a legal obligation to produce an independent EIA, but this is not a matter for the Commissioner to comment on. She can only consider whether the Ministers hold the information which Ms Crosthwaite asked for. It is clear that the Ministers believe they are under no obligation to produce an independent EIA and that have not done so. Consequently, they do not hold the information covered by Ms Crosthwaite's request.
19. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs and can only apply if, in all the circumstances, the public interest in maintaining the exception outweighs the public interest in making the information available.

The public interest

20. In this case, the Commissioner is satisfied that the Ministers did not (and do not) hold the information requested by Ms Crosthwaite. Consequently, she does not consider there to be any conceivable public interest in requiring that any information be made available. The Commissioner notes the arguments which Ms Crosthwaite put forward to show that there would be significant public interest in making the information available; however, as the Commissioner is satisfied that the information does not exist, these arguments carry no weight in this case. The Commissioner concludes that the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.
21. The Commissioner is satisfied, therefore, that the Ministers were entitled to refuse Ms Crosthwaite's request under regulation 10(4)(a) of the EIRs, on the basis that they did not hold the requested information.
22. The Commissioner would comment that it might have been helpful in this case if the Ministers had provided Ms Crosthwaite with the explanation included in their submission to the Commissioner, which outlined the Energy Consent Deployment Unit's process for wind farms and explained the purpose and status of the ES and gave details of where it could be viewed. While this information was not covered by the terms of Ms Crosthwaite's request, it might have helped explain why the Ministers have not carried out an independent EIA for the wind farm.

DECISION

The Commissioner finds that the Ministers complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Ms Crosthwaite.



Appeal

Should either Ms Crosthwaite or the Scottish Ministers 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
24 April 2014



Appendix

Relevant statutory provisions

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;

...

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.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that
 - (a) it does not hold that information when an applicant's request is received;

...