

Decision Notice



Decision 092/2012 Kathleen Winter and Dundee City Council

Weather reports and information relating to winter maintenance

Reference No: 201102286
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www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

Ms Winter requested from Dundee City Council (the Council) information relating to winter maintenance activities carried out at a specified location and weather forecasts during a specified period. The Council refused to disclose the information on the basis that it was exempt from disclosure under sections 33(1)(b) (Commercial interests and the economy) and 36(1) (Confidentiality) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, in which the Council withdrew its reliance on the exemption in section 33(1)(b), Ms Winter remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner took the view that the information identified was environmental information, and asked for the Council's comments. The Council indicated that, should the Commissioner consider the case under the Environmental Information (Scotland) Regulations 2004 (the EIRs), it wished to rely on the exception under regulation 10(5)(b) of the EIRs in withholding the information.

The Commissioner found that the Council had failed to deal with the request in line with the EIRs. She required the Council to disclose the withheld information to Ms Winter.

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); 73 (Interpretation) (definition of "information")

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2), (4)(a) and (5)(b) (Exceptions from duty to make environmental information available); 13(b) and (c) (Refusal to make 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 17 June 2011, Digby Brown, Solicitors, acting on behalf of Ms Winter, wrote to the Council requesting information in relation to an alleged accident at a car park at a specified location, in the following terms:



- (a) Can you confirm that this pavement is adopted by the Council in terms of the Roads (Scotland) Act 1984?

Please provide us with:

- (b) Copies of the winter maintenance route prepared by the Council showing the road/pavement/car park at the [specified location], Dundee.
- (c) Copies of weather reports relevant to the car park at [specified location], Dundee, ingathered for the purposes of monitoring road surface temperature and other weather conditions there for the 14 days prior to the accident extending to the forecast and actual weather conditions until two days following the accident.

Please also confirm:

- (d) What criteria are required on a weather report to instigate gritting/clearing of ice?
- (e) What level of priority for clearance of ice or snow has the car park at the [specified location] been given?
- (f) Was the car park at the [specified location] the subject of ice or snow clearing activity during the week preceding or following the accident?
- (g) What clearing activity was carried out? (i.e. gritting)?
- (h) Please provide copies of any records of complaints made to the Council regarding accidents on this pavement/car park incurring in the two weeks prior and the two weeks following this accident or complaints about the presence of ice or snow during that period.

In this decision, all references to correspondence with Ms Winter are to correspondence with her solicitors

2. On 6 July 2011, the Council wrote to Ms Winter seeking clarification on the exact location of the pavement to which her request referred. Ms Winter responded to the Council and provided the required clarification on 17 August 2011.
3. The Council responded on 12 October 2011. It withheld all of the requested information on the grounds that it was exempt from disclosure under sections 33(1)(b) (arguing that disclosure would, or would be likely to, prejudice substantially the commercial interests of the Council) and 36(1) of FOISA (which applies to information in respect of which a claim of confidentiality could be maintained in legal proceedings) The Council maintained that these exemptions applied because the information was prepared in contemplation of litigation and would not be recoverable in legal proceedings.
4. On 25 October 2011, Ms Winter wrote to the Council requesting a review of its decision. In particular, she argued that the documentation she had requested could not be covered by litigation privilege and could not have been created in contemplation of litigation.



5. The Council notified Ms Winter of the outcome of its review on 22 November 2011. Following its review, the Council withdrew its application of the exemption in section 33(1)(b) of FOISA, but upheld its decision to withhold all of the requested information on the grounds that it was exempt from disclosure under section 36(1) of FOISA.
6. On 30 November 2011, Ms Winter wrote to the Commissioner, stating that she was dissatisfied with the outcome of the Council'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 Ms Winter 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 9 December 2011, the Council was notified in writing that an application had been received from Ms Winter and was asked to provide the Commissioner with any information withheld from her. The Council responded with certain information and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted the Council, 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.
10. The investigating officer advised the Council that it was likely that the Commissioner would consider the information under consideration to comprise environmental information which should have been dealt with under the EIRs. The Council was asked whether it wished to apply the exemption in section 39(2) of FOISA, which applies to environmental information which the authority is obliged to make available in accordance with the EIRs and, if so, what, if any, exceptions in the EIRs it would seek to apply in relation to information covered by the request.
11. In relation to request (a), the investigating officer referred the Council to the fact that its own website contained information which appeared to confirm that the pavement in question had been adopted by it in terms of the Roads (Scotland) Act 1984¹. In view of this, the Council was asked if it would now be prepared to disclose this information to Ms Winter.

¹ <http://www.dundee.gov.uk/forms/LOPR.php>



12. The Council was also asked to clarify its responses to some of Ms Winter's requests, and was asked to explain the searches it had undertaken in order to ascertain that all relevant information had been identified.
13. In response, the Council stated that it did not accept that the information under consideration comprised environmental information. However, it also stated that, should the Commissioner conclude that the information did comprise environmental information, it considered the information to be excepted from disclosure in terms of regulation 10(5)(b) of the EIRs on the basis that its disclosure would, or would be likely to, prejudice substantially the course of justice. The Council provided submissions in relation to the application of the exemption in section 36(1) of FOISA, and indicated that it considered the exception in regulation 10(5)(e) of the EIRs to be applicable for the same reasons. The Council also stated that, should the Commissioner conclude that the information was environmental information, section 39(2) of FOISA should apply to the withheld information.
14. At this stage, the Council also disputed whether the information that it held regarding weather forecasts (request (c)) actually fell within the definition of "information". This is discussed in more detail in what follows.
15. In relation to request (a), the Council stated that it was now prepared to provide the requested information to Ms Winter, but gave no indication of when or whether this information would actually be provided.
16. In subsequent correspondence, the investigation officer pointed out to the Council that there appeared to be no reason why a response to request (a) could not be provided straight away and suggested that this should be done forthwith. The Council subsequently contacted Ms Winter and advised her that the pavement in question had been adopted by it in terms of the Roads (Scotland) Act 1984. Although the Council has now disclosed this information, the Commissioner will nonetheless consider whether it was correct to withhold this information in its initial response to Ms Winter and in its response to her requirement for review.
17. During the course of the investigation, the investigating officer also discussed the matters under consideration with relevant Council officers in order to gain a better understanding of the searches that were carried out in order to establish whether the Council held relevant, recorded information which would address certain parts of Ms Winter's request. These discussions also enabled the investigating officer to understand the types of information recorded by the Council in relation to the matters under consideration during the relevant time periods covered by the request.
18. The investigating officer also contacted Ms Winter during the investigation, seeking her submissions on the matters to be considered in the case. Ms Winter's submissions, along with those of the Council, are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.



Commissioner's analysis and findings

19. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Ms Winter and the Council and is satisfied that no matter of relevance has been overlooked.

Whether the weather forecasts comprise “information”

20. Section 73 of FOISA defines “information” (subject to certain conditions that are not relevant in this case) as meaning information recorded in any form.
21. In its submissions to the Commissioner, the Council noted that the information that had been withheld in response to request (c) comprised weather forecasts. It submitted that the dictionary definition of “information” is “facts proved or learned about something or someone”. The Council argued that a weather forecast is a prediction, not a fact and is therefore not information for the purposes of FOISA.
22. The Commissioner disagrees with this view and believes the Council has applied an unnecessarily restrictive interpretation to the word “information”. Indeed, she is surprised and disappointed that the Council would consider approaching requests for information in this way. The Commissioner also notes that the Council’s approach was somewhat inconsistent as it had seemed content to treat it as information in dealing with the original request and subsequent review.
23. In the Commissioner’s view, there is nothing in the definition of “information” in FOISA that restricts “information” to objectively verified factual information in the manner suggested by the Council. The weather forecasts are plainly information (communicating an expert’s opinion on the likely weather conditions over a forthcoming period, presumably informed by analysis of observed conditions and scientific data). This information is held in a recorded format by the Council and it therefore falls within the definition of “information” in section 73 of FOISA.
24. As the Commissioner is satisfied that the information withheld in response to request (c) does meet the definition of information in FOISA, she has considered it in what follows.

FOISA or EIRs

25. Environmental information is defined in regulation 2(1) of the EIRs. Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
26. The previous Commissioner set out his thinking on the relationship between FOISA and the EIRs in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*² and it need not be repeat in full here. However, some of the key points which are relevant in this case are:

² <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>



- a. The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition of environmental information in the EIRs.
 - b. 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.
 - c. Any request for environmental information therefore **must** be dealt with under the EIRs.
 - d. In responding to a request for environmental information under FOISA, an authority **may** claim the exemption in section 39(2).
27. In this case, the Council handled Ms Winter's request for information and requirement for review in terms of FOISA.
28. As noted above, the Council did not accept that the withheld information comprised environmental information. However, the Council did not provide any reasons to substantiate its position. The Council stated that, should the Commissioner conclude that the information under consideration was environmental information, it considered that the exemption in section 39(2) of FOISA and the exception in regulation 10(5)(b) of the EIRs applied.
29. Having considered the nature of the withheld information, the Commissioner is satisfied that it comprises environmental information as defined within regulation 2(1) of the EIRs. As the requested information concerns the condition of roads, pavements and a car park (including responsibility for its repair and maintenance) and weather forecasts, it relates to the state of the elements of the environment, measures (the Council's policy of, and obligation to, maintain roads and pavements) and activities (the Council's responsibilities in terms of the Roads (Scotland) Act 1984) affecting or likely to affect the elements referred to in part (a) of the definition of environmental information, in particular land and landscape. As such, the Commissioner is satisfied that the information withheld by the Council is environmental information as defined in parts (a) and (c) of the definition.
30. Having drawn this conclusion, the Commissioner must conclude that, by failing to consider and respond to Ms Winter's request in terms of the EIRs, the Council failed to comply with regulation 5(1) and (2)(b) of the EIRs.
31. 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, with a view to any such information being considered primarily in terms of the EIRs.
32. Having reached the conclusion that the information under consideration in this case is environmental information as defined in regulation 2(1) of the EIRs, the Commissioner also finds that the exemption in section 39(2) of FOISA applied to this information.
33. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner 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 disclosure of the information under FOISA. The Commissioner has consequently proceeded to consider this case in what follows solely in terms of the EIRs.

Regulation 10(4)(a) of the EIRs

34. Regulation 10(4)(a) of the EIRs provides 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. 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 of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.
35. In this case, the Council responded to both Ms Winter's request for information and her requirement for review by indicating that relevant information was held, and stating that all of the information requested was exempt from disclosure under FOISA.
36. When asked to provide the withheld information to the Commissioner, the Council confirmed that the relevant pavement was adopted by the Council in terms of the Roads (Scotland) Act 1984 (and so addressed request (a)) and provided copies of weather forecasts (falling within the scope of request (c)). Although the Council provided narrative responses to the other parts of Ms Winter's information request, the Council did not provide any records containing the information falling within the scope of requests (b), (d), (e), (f), (g) and (h).
37. Following correspondence with the Council and the investigating officer's discussions with Council officers, the Commissioner is satisfied that the Council does not, and did not at the time it received Ms Winter's information request, hold any recorded information that would fulfil the terms of requests (b), (d), (e), (f), (g) and (h).
38. Having reached this conclusion, the Commissioner finds that the only appropriate response to these parts of Ms Winter's request would have been to notify her that the requested information was excepted from disclosure under regulation 10(4)(a) of the EIRs, on the basis that it did not hold the information. Since the Council did not hold any of the information that would fulfil the terms of requests (b), (d), (e), (f), (g) and (h), the Commissioner notes that there could not be any conceivable public interest in requiring that any information be made available.
39. Having concluded that the Council did not hold any recorded information falling within the scope of these requests, and that the Council failed to give any indication that the request was being refused on those grounds, the Commissioner finds that the Council failed to give proper notice in terms of regulation 13 of the EIRs (and in particular regulations 13(b) and (c)) which provide that, where a request to make environmental information available is refused by a Scottish public authority, the refusal must be provided in writing and must specify the authority's reasons for refusal. This should include details of any exception the authority considers applicable under regulation 10(4) or (5) (or provision of regulation 11), with the basis on which these are considered to apply, and also how the public authority has reached its decision with respect to the public interest under regulation 10(1)(b).



40. Having handled the request solely in terms of FOISA, the Council did not identify any exception in regulation 10(4) or (5) that was applicable in this case. Furthermore, since the Council gave no indication that it did not hold the information sought by parts (b), (d), (e), (f), (g) and (h) of Ms Winter's request, the Commissioner concludes that the Council's refusal did not include any appropriate or relevant response, in line with regulation 13(b) and (c), to these parts of Ms Winter's request in terms of the EIRs.
41. The Commissioner is aware that this is not the first occasion on which the Council has sought to withhold information under Part 2 of FOISA or under the EIRs, apparently without having established whether it actually held the relevant information.
42. The Commissioner would urge the Council to ensure that, in response to future information requests, it clearly establishes whether it actually holds each piece of requested information before notifying requesters where it considers the information is exempt from disclosure under Part 2 of FOISA or is excepted from disclosure under the EIRs. Failure to do so risks breaches of technical provisions of FOISA and the EIRs as identified in this case.

Regulation 10(5)(b) of the EIRs

43. Regulation 10(5)(b) 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 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.
44. Although there is no definition within the EIRs of what would constitute substantial prejudice, it is the Commissioner's view that the standard to be met in applying this test is high. The word "substantial" is important here: the harm caused, or likely to be caused, by disclosure must be of some real and demonstrable significance. The risk of harm must be real or very likely, not simply a remote or hypothetical possibility.
45. The Council has submitted that it considered this exception to be applicable on the basis that disclosure would be likely to prejudice substantially the course of justice, arguing that the withheld information had been created in contemplation of litigation and therefore was subject to litigation privilege and consequently covered by regulation 10(5)(b).
46. As noted above, the Council argued that all of the information sought by Ms Winter was prepared by the Council in contemplation of litigation. However, as the Commissioner is satisfied that the Council only holds recorded information that would address requests (a) and (c), she will only address these requests in what follows.
47. The Commissioner has considered the position regarding legal professional privilege in a number of previous decisions. One aspect of legal professional privilege is litigation privilege, which covers documents created in contemplation of litigation (also known as communications *post litem motam*).



48. Communications *post litem motam* are granted confidentiality in order to ensure that any person or organisation involved in or contemplating a court action can prepare their case as fully as possible, without the risk that their opponent/s or prospective opponent/s will gain access to the material generated by their preparations. The privilege covers communications at the stage when litigation is pending or in contemplation. Whether a particular document was prepared in contemplation of litigation will be a question of fact, the key question generally being whether litigation was actually in contemplation at a particular time.
49. For information to be covered by litigation privilege, it must have been created for the dominant purpose of obtaining legal advice on the litigation or for lawyers to use in preparing the case. This is a question of fact in each case. Information created for another purpose before the litigation was anticipated may sometimes still be covered if brought together for the purpose of the litigation. This may be the case if pre-existing documents are relevant to the case and the lawyer has exercised skill and judgement in selecting and compiling them, particularly if the selection of documents reveals the trend of the advice on the case. However, pre-existing documents will not become privileged just by being passed over to a lawyer.
50. Litigation privilege will apply to documents created by the party to the potential litigation, expert reports prepared on their behalf and legal advice given in relation to the potential litigation: the communication need not involve a lawyer to qualify. The litigation contemplated need never actually happen for the privilege to apply, and it will continue to apply after any litigation has been concluded.
51. The Council submitted that Ms Winter's information request was a "fishing expedition" to find out whether any information existed that would enable a personal injury claim to be raised against the Council. The Council argued that the request had been made by the agent of a party who wished to pursue a legal action against the Council in circumstances where that party was certainly contemplating litigation.
52. The Council submitted that there was nothing in FOISA or the EIRs which modified the well established rules relating to the recovery of documentary and real evidence in court proceedings. The Council stated that these rules include the well known rule that, in no circumstances, will the Court at any stage grant a "fishing" diligence for the recovery of documents which a party hopes will disclose material for a case which he has not viewed on record.
53. The Council argued that the terms of section 36(1) of FOISA are clearly established, especially because an application under section 1 of the Administration of Justice (Scotland) Act 1972³ (this being an application to the Court to order the production or recovery of documents or property which are relevant to a Court case) falls within the definition of "legal proceedings". The Council has indicated that it considers the exception in regulation 10(5)(b) of the EIRs to be applicable for the same reasons.

³ <http://www.legislation.gov.uk/ukpga/1972/59/introduction>



54. The Council also argued that, as far as the term “contemplation of litigation” is concerned, this had to be construed from the point of view of a defender (in a legal action). The Council submitted that many of its documents were created with a view to avoiding litigation or maximising prospects of success and were therefore created “in contemplation of litigation” as regards the Council as defender. The Council noted that the position of a pursuer in a legal action is very different, as a pursuer only contemplates litigation when they consider they might have a claim and that any view that “in contemplation of litigation” can only apply at or near the time of a response to an actual claim was too narrow an interpretation and an error in law.
55. In her submissions, Ms Winter argued that whether a particular document was created in contemplation of litigation was a question of fact, and the key test was whether litigation was actually in contemplation at a particular time.
56. Ms Winter argued that the documents being sought related to a winter maintenance programme and information relating to accidents relating to a public footpath, car park and road between specified dates in 2011. She submitted that the Council has a duty in law to maintain adopted footpaths and highways and the documentation in question ought to have been created in compliance with its legal duties. She argued that the relevant documents were prepared by the Council several months, or years, prior to any potential litigation being contemplated and accordingly, could not be held to have been prepared in contemplation of litigation.
57. Ms Winter submitted that the Council appeared to be operating a blanket policy of refusing any request for information on the basis of confidentiality and that such a stance appeared to her to be unreasonable. She considered that for such a position to be maintained, the Commissioner would have to find that any document prepared and held by the Council, at any given time, was prepared “with a view to avoiding litigation”.
58. Finally, Ms Winter argued that, for a document to be privileged, it must have come into existence when litigation was in reasonable prospect or pending. She submitted that the records she was seeking were prepared by Council staff as part of their daily routines, in the course of their employment and, as such, could not be said to have been prepared in contemplation of litigation

The Commissioner’s view

59. The Commissioner notes the arguments advanced by the Council, but would stress that the rules governing the information which can be requested through the court recovery process are different to those governing requests under the EIRs (or FOISA). It may well be the case that an application to the courts made under the 1972 Act will lead to less (or, indeed, more) information being disclosed than a request under the EIRs (or FOISA), but that does not mean that a request made under the EIRs (or FOISA) should be interpreted only in the light of what a person would be entitled to by virtue of the 1972 Act.



60. When considering the Council's handling of Ms Winter's request in terms of EIRs, the Commissioner has considered those arguments, and considered whether they demonstrate that the harm test in regulation 10(5)(b) would be met if the withheld information was disclosed.
61. The Commissioner notes that the information sought in request (a) can be found on the Council's website and therefore cannot be considered to be confidential, nor can there be any substantial prejudice to the course of justice by its disclosure. As such, the Commissioner finds that the information sought in request (a) is not excepted from disclosure under regulation 10(5)(b) of the EIRs. Although this information was disclosed to Ms Winter during the investigation, this was only as a result of the investigating officer pointing out to the Council that the information was in fact available on its own website.
62. The Commissioner notes that, unlike section 36(1) of FOISA, the wording of regulation 10(5)(b) does not explicitly except from disclosure information in relation to which a claim to confidentiality of communications could be maintained in legal proceedings (subject to the public interest test). The Commissioner recognises that the course of justice requires that parties to litigation (including public authorities) are able to prepare fully for a case. As noted above, the principle, derived from the adversary nature of litigation, is that no party can recover material which another party has made in preparing its own case. Disclosure of information covered by litigation privilege will in many cases lead to substantial prejudice relevant to the exception in regulation 10(5)(b).
63. The Commissioner would also note that, even where information is subject to litigation privilege, an authority still must be satisfied that disclosure would, or would be likely to, cause substantial prejudice to the relevant interests before applying regulation 10(5)(b). Whether relevant harm is likely to occur will depend according to the circumstances of the particular case under consideration, and the likelihood that disclosure would or would be likely to prejudice substantially the course of justice may fade over time.
64. In considering the information sought in request (c), the Commissioner has considered the purpose for which the communication was made; as noted above, whether the information in these documents was prepared in contemplation of litigation will depend on the circumstances of each case.
65. As Lord Justice-Clerk Thomson commented in *Young v National Coal Board* 1957 SC 99 (at page 105):



“The court has inherent power to compel the parties to a cause to produce documents which may have a bearing on the issues between them. The court will not, however, in the ordinary run of things order production of documents which have been prepared in anticipation or in development of a party’s case. Once the parties are at arm’s length, or are obviously going to be at arm’s length, the details of their preparation of weapons and ammunition are protected as confidential. Just when the parties come to be at arm’s length may often be a difficult question, especially as some potential defenders prepare well in advance against the contingency of accidents, and indeed, under modern conditions, few accidents and particularly few industrial accidents can happen without it occurring to one or other party at any early stage that questions of disputed liability may arise.”

66. As Lord Justice-Clerk Thomson made clear, it can be difficult to identify when parties come to be at arm’s length (and, as a result, when the *post litem motam* rule will come into effect). However, a general apprehension of future litigation or possibility that someone might at some point in the future make a claim against the Council, is not, in the Commissioner’s view, sufficient, given that, according to Lord Justice-Clerk Thomson, the parties must either be at arm’s length, or are “obviously going to be” at arm’s length.
67. Having considered the nature of the information sought in request (c), the Commissioner cannot agree that the information was prepared in contemplation of litigation. The information in question was created prior to the receipt of Ms Winter’s information request, which the Council had concluded to be an indication that litigation was being contemplated. However, there is nothing to suggest that the information was prepared in anticipation of litigation, or in development of the Council’s case should any litigation proceed.
68. The Commissioner does not agree that the information withheld in response to request (c) was created in contemplation of litigation. Accordingly, she does not consider the information to be subject to litigation privilege. She is unable to accept the Council’s contention that the information was created with a view to avoiding litigation or maximising prospects of success and were therefore created “in contemplation of litigation” as regards the Council as defender. In the Commissioner’s view, the information was created as part of the Council’s usual business with a view to ensuring the maintenance and repair of its roads, pavements and carparks in fulfilment of its statutory duties.
69. In the circumstances, the Commissioner is unable to accept that the disclosure of such routine information would, or would be likely to, cause substantial prejudice to the course of justice.
70. Having found that the exception in regulation 10(5)(b) did not apply in the circumstances of this case, the Commissioner is not required to go on to consider the public interest test in regulation 10(1)(b) in relation to the withheld information.
71. The Commissioner finds that the Council breached regulation 5(1) of the EIRs by withholding the information in relation to requests (a) and (c).



Conclusion

72. As the Commissioner has found that the exception in regulation 10(5)(b) of the EIRs has been incorrectly applied by the Council, she now requires the Council to disclose the information sought by Ms Winter in request (c) (the information sought in request (a) having been disclosed by the Council during the investigation).

DECISION

The Commissioner finds that Dundee City Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information requests made by Ms Winter.

The Commissioner finds that, by failing to identify and respond to Ms Winter's information requests as requests seeking environmental information as defined in regulation 2(1) of the EIRs, the Council breached regulations 5(1) and 2(b) of the EIRs.

The Commissioner finds that, by failing to notify Ms Winter that it did not hold any recorded information falling within the scope of requests (b), (d), (e), (f), (g) and (h) (and so that information was excepted from disclosure under regulation 10(4)(a)), the Council failed to comply with the requirements of regulations 13(b) and (c) of the EIRs.

The Commissioner finds that the Council was not entitled to withhold the information falling within the scope of requests (a) and (c) on the basis that it was excepted from disclosure under regulation 10(5)(b) of the EIRs. By failing to provide Ms Winter with the requested information, the Council failed to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires the Council to provide Ms Winter with the information sought in request (c) by 26 July 2012.



Appeal

Should either Ms Winter or Dundee City Council 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.

Rosemary Agnew
Scottish Information Commissioner
11 June 2012



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.

...



73 Interpretation

In this Act, unless the context requires a different interpretation –

...

"information" (subject to sections 50(9) and 64(2) means information recorded in any form;

...

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;

...

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.

...

- (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;

...

- (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;

...

13 Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-

...



- (b) specify the reasons for the refusal including, as appropriate, any exception under regulation 10(4) or (5) or provision of regulation 11 and how the Scottish public authority has reached its decision with respect to the public interest under regulation 10(1)(b);
- (c) state the basis on which any exception relied on under regulation 10(4) or (5) or provision of regulation 11 applies if it would not otherwise be apparent

...