

Decision Notice

Decision 093/2019: Mr R and Fife Council

Discontinuance Order claim

Reference No: 201801828

Decision Date: 27 June 2019



Scottish Information
Commissioner

Summary

The Council was asked about a claim for compensation, lodged by a private business following the issue of a Discontinuance Order.

The Council considered the request under the EIRs, refusing to provide the information as it considered it to be commercially confidential. It also believed disclosure would prejudice the confidentiality of the Council's proceedings, and the interests of the person who provided the information.

The Commissioner investigated and found that the Council had correctly withheld the information under regulation 10(5)(e) of the EIRs, on the basis of commercial confidentiality. However, he also found that some of the withheld information, only identified during the investigation, should have been identified earlier.

Relevant statutory provisions

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); 10(1), (2) and (5)(e) (Exceptions from duty to make environmental information available)

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 22 January 2018, Mr R made a request for information to Fife Council (the Council). In his request, he referred to planning application 12/00675/FULL which related to the erection of a pergola in an outdoor beer garden at the West Port Hotel, St Andrews. The structure was subsequently the subject of a Discontinuance Order made in 2015, which was later confirmed by the Scottish Ministers. Mr R understood the current owners of the premises had lodged a claim for compensation arising from the Discontinuance Order. Mr R requested copies of any documents submitted to the Council asserting or pursuing such a claim, or any other claim resulting from the Discontinuance Order, and of any response(s) provided by the Council.
2. The Council responded on 9 February 2018. It considered the request under the EIRs and refused to provide the information requested, with explanation. The Council deemed the information to be excepted from disclosure under the exceptions in regulations 10(5)(e) and (f) of the EIRs, and concluded that the public interest favoured non-disclosure.
3. On 5 April 2018, Mr R wrote to the Council, requesting a review of its decision as he disagreed with the exceptions applied, arguing there was a substantial public interest in disclosure of the information.
4. The Council notified Mr R of the outcome of its review on 24 April 2018, upholding its original decision with modification. While it fully upheld its original decision to withhold the information under regulations 10(5)(e) and (f) of the EIRs, the Council now also considered

the information to be excepted from disclosure under regulation 10(5)(d) of the EIRs, again with the balance of public interest favouring non-disclosure.

5. On 23 October 2018, Mr R wrote to the Commissioner, applying for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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 R stated he was dissatisfied with the outcome of the Council's review because he disagreed with the exceptions applied, arguing that there was a substantial public interest favouring disclosure. Mr R's arguments in support of his application are expanded upon later in this decision.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr R 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 26 November 2018, the Council was notified in writing that Mr R had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr R. The Council provided the information 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 to answer specific questions. These focused on the Council's justification for withholding the information under the exceptions in regulations 10(5)(d), (e) and (f) of the EIRs.
9. Mr R was also asked for his views on the public interest in disclosure of the information, but provided no further comments.

Commissioner's analysis and findings

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

Handling in terms of the EIRs

11. The Council considered Mr R's request under the EIRs, having concluded that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
12. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
13. The Council submitted that the information requested by Mr R related to the removal of a construction adjoined to a building, and the environmental and commercial impact of its removal. The Commissioner accepts this as a reasonable description and, in the circumstances, is satisfied that the information requested by Mr R falls within the definition of environmental information set out in regulation 2(1), in particular paragraphs (a), (c) and (f) of that definition. Mr R has not challenged the Council's decision to deal with the information as

environmental information and the Commissioner will consider the handling of the request in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs – Duty to make environmental information available

14. Regulation 5(1) of the EIRs 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.
15. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).

Information held

16. During the investigation, the Council identified additional correspondence which fell within the scope of Mr R's request, submitting it wished to withhold this further information under the exceptions in regulations 10(5)(d), (e) and (f) of the EIRs.
17. In order to ascertain whether all relevant information had been identified, the Council was asked to explain the steps it took to establish what information it held and which fell within the terms of Mr R's request. The Council explained that all information relating to the matter was held by its Legal Services Manager, who carried out a review of the information held in the Council's internal Legal case management system, and searched paper files and emails received from, or sent to, the premises owners and their agents.
18. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.
19. Having considered all the relevant submissions and the terms of the request, the Commissioner is satisfied that the information held by the Council and falling within the scope of Mr R's request was capable of being identified by the searches carried out by the Council. As such, he is satisfied that, by the end of the investigation, the Council had taken adequate, proportionate steps to establish the extent of information held that was relevant to the request.
20. However, the information referred to in paragraph 16 should clearly have been identified by the close of the Council's review, at the latest. In failing to do this, the Council failed to deal with the request fully in accordance with regulation 5(1) of the EIRs.

Regulation 10(5)(e) of the EIRs

21. The Council submitted that the information withheld was excepted from disclosure by virtue of regulation 10(5)(e) of the EIRs.
22. In his application to the Commissioner, Mr R maintained that regulation 10(5)(e) of the EIRs was of no relevance to this request.
23. Regulation 10(5)(e) 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 confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.

24. As with all of the exceptions contained within regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
25. The Aarhus Convention: an Implementation Guide¹ (which offers guidance on the interpretation of the Aarhus Convention, from which the EIRs are derived) notes (page 88) that the first test for considering this exception is whether national law expressly protects the confidentiality of the withheld information. The law must explicitly protect that type of information as commercial or industrial secrets. Secondly, the confidentiality must protect a "legitimate economic interest": this term is not defined in the Convention, but its meaning is considered further below.
26. Having taken this guidance into consideration, the Commissioner's view is that before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
 - (i) Is the information commercial or industrial in nature?
 - (ii) Does a legally binding duty of confidence exist in relation to the information?
 - (iii) Is the information publicly available?
 - (iv) Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

Is the information commercial or industrial in nature?

27. In his requirement for review, Mr R argued that a claim for compensation under section 83 of the Town and Country Planning (Scotland) Act 1997 (the "1997 Act") did not involve any confidential commercial or industrial information. It was simply a claim for an amount of money, and the Council had not identified what confidential commercial or industrial information could be involved.
28. The Council submitted that the information comprised more than simply a sum of money. It contained projections, costings and profit and loss information of the current owners (the claimant). As such, the Council was satisfied that the information was commercial in nature.
29. Having considered the withheld information, which comprises not only the amount of the claim, but also supporting documentation (including financial projections, costings and profit and loss information) together with related correspondence surrounding the claim and the negotiations relating to it, the Commissioner accepts that the information is commercial in nature, for the reasons claimed by the Council.

Does a legally binding duty of confidence exist in relation to the information?

30. In the Commissioner's view, confidentiality "provided for by law" will include confidentiality imposed on any person under the common law of confidence, under a contractual obligation or by statute.
31. In his requirement for review, Mr R argued that the Council had not explained that there was, or could be, any legally binding duty of confidence relating to the information.

¹ http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

32. In his application to the Commissioner, Mr R maintained there was no legally binding duty of confidence, whether negotiations were underway or otherwise. He contended that the claim was made on an arm's length basis by one party against another, pursuant to statute, and that the 1997 Act did not provide for such claims to be made in private: absent settlement, the claim and all supporting evidence would be dealt with in open court.
33. Mr R argued that neither the 1997 Act (under section 71 of which the Discontinuance Order was made), nor the common law imposed any duty of confidence in such circumstances.
34. Mr R further contended that simply marking information as "confidential" did not create a duty of confidence and, were that the case, every communication would be marked as such, thus defeating freedom of information law and regulations.
35. In Mr R's view, the Council had not identified, prior to the claim having been made, how the claimant had requested that the information should remain private, or on what basis the Council could have lawfully assured the claimant that the information would be treated as such.
36. The Council submitted that the information was provided (by the claimant) in support of a claim and was marked "confidential". It argued that the expectation, in proceedings of this nature, was that the information would be treated as such, and would not be released into the public domain. The Council confirmed that the claim had not yet been resolved and proceedings relating to negotiations were still ongoing. As such, it considered that a legally binding duty of confidence existed.
37. The Council explained, and provided evidence, that it had contacted the claimant who confirmed the information should remain confidential, given the claim had not yet been settled. The claimant expressed concerns that, as the information also comprised profit and loss information, this would provide third parties with more detailed information than would ordinarily be available to them, allowing them to tailor strategies to the commercial detriment of the business. While the claimant provided further explanation in support of these views, the Commissioner is unable to expand on this any further as to do so would reveal elements of the withheld information.
38. The Council confirmed that while the information was not covered by any confidentiality agreement between the parties involved, there was an expectation that such negotiations require information to be provided confidentially for the sole purpose of being able to conclude negotiations. It submitted that disclosure of information and correspondence relating to the claim and the negotiation thereof would have an impact on future negotiations in cases pursuing settlement. In the Council's view, disclosure might hinder any possibility of settlement, by removing the expectation that the information would be treated confidentially and so creating a deterrent for third parties entering into such negotiations with the Council.
39. The Commissioner has considered the withheld information in the context of the request, together with the Council's submissions and supporting evidence. The Commissioner notes the Council's point that the information was marked "confidential" upon receipt, although this, in itself, is not sufficient to allow information to be withheld under the EIRs. The Commissioner also notes the comments provided by the claimant, obtained prior to the Council's review response to Mr R, which confirms its view that the claim should remain confidential. While there is nothing (other than this) which points to evidence of an explicit obligation of confidentiality, the Commissioner is satisfied, in the circumstances, that the information was exchanged under an implied obligation to maintain confidentiality. He acknowledges that such an expectation is normal practice in transactions of this nature, and

does not consider the statutory character of this particular claim to affect that expectation. Accordingly, the Commissioner is satisfied that an implied duty of confidence existed and applied to the withheld information, at the time the Council responded to Mr R's request and his requirement for review.

Is the information publicly available?

40. In his application to the Commissioner, Mr R argued that the Council had already publicly confirmed (in papers submitted to a meeting of the North East Fife Area Planning Committee on 28 June 2017) that the claim in question had been submitted.
41. The Council submitted that the information requested was not in the public domain.
42. The Commissioner acknowledges that confirmation of a claim being lodged against the Council, based on the making of the Discontinuance Order, is in the public domain. This is contained in point 4.3 of the report "Budgetary Implications arising from Awards of Expenses from Planning Appeal Decisions taken by the DPEA: 2014-2017"² considered under Agenda Item 7 of the Council's North East Planning Committee meeting of 28 June 2017. However, details of the amount claimed and the information in the supporting documentation and correspondence are not. Therefore, the Commissioner accepts the Council's position that the withheld information is not publicly available.

Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

43. The term "legitimate economic interest" is not defined in the EIRs. In the Commissioner's view, the interest in question should be financial, commercial or otherwise "economic" in nature. The prejudice to that interest must be substantial: in other words, it must be of real and demonstrable significance.
44. In his requirement for review, Mr R argued that the Council had not explained how any legally-binding duty of confidence might protect a legitimate economic interest, or how disclosure of the information might cause, or be likely to cause, substantial harm to any such economic interest.
45. In his application to the Commissioner, Mr R contended that the information provided by the claimant in support of the claim must now be out of date, and that any negotiations must now be concluded and a settlement reached.
46. The Council submitted that the claim documentation included profit and loss information relating to the claimant's business. It argued that disclosure would provide third parties with more detailed information than would ordinarily be available to them, and would enable them to tailor strategies that would be to the commercial detriment of the business. This was supported by the submissions obtained from the claimant, however, and again the Commissioner is unable to expand on these any further without revealing elements of the withheld information.
47. Having considered these submissions, and the information itself, the Commissioner recognises that the information was provided to the Council with an expectation of maintaining confidentiality. He has also taken into account the fact that, as at the dates of Mr R's request and requirement for review, the claim had not yet been resolved, and proceedings relating to negotiations were still ongoing.

² http://publications.fifedirect.org.uk/c64_Agenda-280617pdf.pdf

48. In the circumstances, the Commissioner accepts that disclosure of the withheld information in this case would be likely to prejudice the claimant's business and financial position substantially, for the reasons claimed by the Council.
49. The Commissioner is satisfied, therefore, that the Council was entitled to apply the exception in regulation 10(5)(e) to the information requested.

Public interest test – regulation 10(5)(e)

50. Having accepted that the exception in regulation 10(5)(e) applies to the information withheld from Mr R, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs. This states that a Scottish public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.
51. In his application to the Commissioner, Mr R referred to a report³ dated 22 July 2015 by the Scottish Public Services Ombudsman (reference 201301594) which, inter alia, recommended that the Council should consider taking enforcement measures in relation to the erection of the pergola, or the making of a Discontinuance Order. Mr R submitted that Council Officers had subsequently agreed to make a Discontinuance Order, in November 2015.
52. Mr R submitted that there was a substantial public interest in knowing what claim for compensation, arising from the Discontinuance Order, had been made and how the Council had responded. He argued that open scrutiny of the Council's handling of the claim would assure members of the public that no Council funds were spent on meeting unjustifiable claims, and that the threat and making of such a claim did not influence the handling of any subsequent planning applications by the premises owners.
53. The Council confirmed it wished to rely on the public interest arguments set out in its review outcome. It acknowledged that there was a public interest in knowing how public funds might be used in settlement of a claim, and that the value of the claim was of interest to Mr R and the wider public, particularly as the matter in question had received much public exposure.
54. However, the Council also believed there was a significant public interest in protecting the public purse, by being able to properly assess the claim and carry out the due diligence required, through having sight of all relevant commercial information, particularly where that information was provided in the expectation that it would remain private. The Council considered that, in so doing, it was essential that such proceedings remained confidential while negotiations were still ongoing, particularly where the claimant had an option of further appeal in the event of settlement not being achieved. The Council considered these factors outweighed the public interest in making the information available.

The Commissioner's view

55. The Commissioner has already concluded that disclosure of this information would be likely to cause substantial prejudice to a legitimate economic interest, and has also found an implied duty of confidence in relation to the withheld information. As he has recognised in previous cases, there is a strong public interest in maintaining confidentiality where confidentiality is provided for by law.

³ <https://www.spsso.org.uk/investigation-reports/2015/july/fife-council>

56. The Commissioner also recognises there is a considerable public interest in transparency and public scrutiny in relation to how public authorities make decisions, particularly those involving the expenditure of public funds. Disclosure, in this case, this would contribute to the public's understanding of the issue in question, and the factors taken into account by the Council when progressing proceedings and negotiations relating to the claim.
57. The Commissioner also notes that, at the time the Council considered the request and requirement for review, the claim had not been resolved, and that this continued to be the position during the investigation.
58. Bearing in mind the substantial harm he has already identified, the Commissioner accepts that there is no public interest in disclosing information that would impede parties involved in negotiations from being able to conclude those negotiations in a confidential setting, where disclosure might have a consequential impact on the ability to do so.
59. The Commissioner has considered carefully all the public interest arguments he has received. He must consider the actual circumstances of the case, and whether the Council was correct in its decision, at the time it responded to the request and subsequent requirement for review. That position may change in time, but the issue here is whether the Council responded to this particular request correctly at the relevant time.
60. In all of the circumstances of the case, therefore, the Commissioner finds that the public interest in maintaining the exception outweighed that in making the information available, at the time the Council responded to Mr R's request and requirement for review. He therefore concludes that the Council was entitled to withhold the information under regulation 10(5)(e) of the EIRs.
61. As the Commissioner has determined that all of the withheld information was correctly withheld under regulation 10(5)(e), he is not required to go on to consider the application of regulations 10(5)(d) and (f) of the EIRs.

Decision

The Commissioner finds that Fife Council generally complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr R. It was correct to withhold information under regulation 10(5)(e) of the EIRs, but failed to comply fully with regulation 5(1) of the EIRs in only identifying some of the withheld information after the Commissioner's investigation had started.

Appeal

Should either Mr R or Fife 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.

Daren Fitzhenry
Scottish Information Commissioner

27 June 2019

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.

...

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-

...

- (e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info