

Decision Notice

Decision 107/2019: Mr S and Scottish Environment Protection Agency

Removal of waste from Darnconner Open Cast, Auchinleck

Reference No: 201801866

Decision Date: 12 July 2019



Scottish Information
Commissioner

Summary

SEPA was asked about the location and nature of waste deposits at Darnconner Open Cast, Auchinleck. SEPA withheld the information.

The Commissioner investigated and found that SEPA was entitled to refuse to withhold the information as disclosure would, or would be likely to, substantially prejudice its ability to carry out a criminal investigation (regulation 10(5)(b)).

Relevant statutory provisions

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

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 7 August 2018, following correspondence with the Scottish Environment Protection Agency (SEPA) regarding the removal of waste from Darnconner Open Cast, Auchinleck, solicitors acting for Mr S made the following information request to SEPA:

In order that we are in a position to properly advise our client and our client fulfils his obligations to cooperate with SEPA, we would be obliged if you could confirm as follows:

(1) The nature and extent of any waste deposits identified;

(2) Sight of any report prepared following sampling; and

(3) Details as to the location on the site where said deposits were identified.
2. The submissions referred to in this decision as being from Mr S (and references to correspondence with Mr S) should be taken to include submissions from (and correspondence with) his solicitors on his behalf.
3. SEPA notified Mr S that the information was excepted from disclosure under regulation 10(5)(b) of the EIRs as disclosure would, or would be likely to, prejudice substantially SEPA's ability to carry out a criminal investigation. SEPA stated that, having carried out the public interest test, it had also determined that the public interest in favour of maintaining the exception outweighed the public interest in making the information available.
4. On 28 August 2018, Mr S wrote to SEPA requesting a review of its decision. He considered that none of the three “limbs” of the exception in regulation 10(5)(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) applied. Mr S also argued that it was in the public interest to disclose this information so that he could meaningfully engage in preparing proposals with a view to removing the material concerned.

5. SEPA notified Mr S of the outcome of its review on 25 September 2018. It confirmed its decision of 24 August 2018 without modification.
6. On 30 October 2018, Mr S wrote to the Commissioner. He applied to the Commissioner 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 S was dissatisfied with the outcome of SEPA's review, arguing that regulation 10(5)(b) did not apply given the restricted nature of the information he had asked for.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr S 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.
8. On 4 December 2018, SEPA was notified in writing that Mr S had made a valid application. The case was allocated to an investigating officer and arrangements were made for the information withheld from Mr S to be inspected by Commissioner's staff.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. SEPA was invited to comment on this application and to answer specific questions, focussing on its reliance on regulation 10(5)(b) of the EIRs.
10. Mr S was also given an opportunity to make further submissions, but chose not to do so.

Commissioner's analysis and findings

11. 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 him by both Mr S and SEPA. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

12. It is evident from the subject matter (waste deposits) that any information falling within the scope of Mr S's request would be environmental information, as defined in regulation 2(1) of the EIRs (paragraph (a): information relating to the state of the elements of the environment; paragraph (b): factors affecting or likely to affect the elements of the environment; or paragraph (c): information on measures affecting or likely to affect those elements).
13. Mr S has not disputed this and the Commissioner will consider SEPA's handling of the request solely in terms of the EIRs.

Regulation 10(5)(b)

14. Under regulation 10(5)(b) of the EIRs, 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 an individual to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature.
15. As with all exceptions in regulation 10, it is subject to the public interest test in regulation 10(1)(b) and, in line with regulation 10(1)(a), must be interpreted in a restrictive way with a presumption in favour of disclosure.

16. Although there is no definition of “substantial prejudice” in the EIRs, the standard to be met in applying the test is high. The word “substantial” is important here: the harm caused, or likely to be caused, by disclosure must be of real and demonstrable significance. The risk of harm must be real or very likely, not simply a remote or hypothetical possibility.
17. In his request for review, Mr S queried how disclosure of the information covered by his request could substantially prejudice:
 - (i) the course of justice (he argued that there were no ongoing proceedings);
 - (ii) the ability of a person to receive a fair trial (again he argued that there were no ongoing proceedings and, if there were, the Crown would disclose the information to him, meaning that disclosure under the EIRs would not affect his ability to receive a fair trial); or
 - (iii) the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature (Mr S considered SEPA’s investigation had concluded).
18. Mr S directed the Commissioner to previous decisions which, he considered, supported his case for the information to be released. The Commissioner has considered these cases and any impact they may have on the outcome of this decision, but stresses that each case must be treated according to its own merits.
19. SEPA argued that the information was excepted from disclosure by regulation 10(5)(b), because its disclosure would, or would be likely to, cause substantial prejudice to its ability to conduct an inquiry of a criminal nature.
20. SEPA confirmed that its investigation was ongoing when it carried out its review on 25 September 2018 (the Commissioner must consider the position as at that date). SEPA’s review response refers to its Enforcement Policy and notes that one of the options open to it under this Policy would be to refer the matter to the Crown Office and Procurator Fiscal Service prosecution.
21. SEPA provided detailed submissions to the Commissioner on regulation 10(5)(b) during his investigation. Due to the nature of its inquiries, SEPA asked the Commissioner not to include details of its submissions in this decision on the basis that publishing the submissions would in itself substantially prejudice SEPA’s ability to conduct an inquiry.
22. In this case, the Commissioner is aware that, explaining his reasoning with reference to the submissions made by SEPA would inevitably disclose details of the withheld information. As the Court of Session recognised in *Scottish Ministers v Scottish Information Commissioner* [2006] CSIH 8 (at [18]):

It is important, in our view ... to bear in mind that the [Commissioner], in giving reasons for his decision, is necessarily restrained by the need to avoid, deliberately or accidentally, disclosing information which ought not to be disclosed.
23. Having considered the withheld information, the submissions made by Mr S (including those on the “restrictive” nature of the requests) and the submissions made by SEPA, the Commissioner is satisfied that disclosure would seriously undermine an ongoing criminal investigation by SEPA. He is therefore satisfied that disclosure would, or would be likely to, prejudice substantially the ability of SEPA to conduct an inquiry of a criminal nature. The information is therefore excepted from disclosure under regulation 10(5)(b).

Public interest test

24. The Commissioner must now go on to consider the public interest test in regulation 10(1)(b) of the EIRs. This specifies that a 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.
25. On balance, SEPA considered that the public interest in ensuring it was able to conduct its enforcement duties without substantially prejudicing an ongoing case outweighed the public interest in making the information.
26. Mr S argued that it was in the public interest for the information to be disclosed to him to allow him to engage meaningfully with SEPA with a view to removing the material concerned.
27. The Commissioner recognises that there is a strong public interest in transparency and in understanding how SEPA enforces environmental protection matters in Scotland.
28. However, the Commissioner must also bear in mind the relevance of the information to an ongoing investigation. There is a clear public interest in SEPA being free to take the most appropriate and effective action in the interests of the public and the environment, without that action being undermined by the information being disclosed under the EIRs.
29. While the Commissioner recognises the personal interest Mr S has in disclosure of the information, he does not consider that this equates to a public interest in the disclosure.
30. On balance, the Commissioner finds, in all the circumstances, that the public interest in making the information available is outweighed by that in maintaining the exception in regulation 10(5)(b).

Decision

The Commissioner finds that the Scottish Environment Protection Agency complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr S.

Appeal

Should either Mr S or SEPA 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

12 July 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;
- (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.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.

...
- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-
 - (b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;

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