

Decision Notice

Decision 120/2015: The Kennel Club and the Scottish Ministers

Orkney Core Path Plan review

Reference No: 201500658

Decision Date: 27 July 2015



Scottish Information
Commissioner

Summary

On 23 July 2014, The Kennel Club asked the Scottish Ministers (the Ministers) for information relating to Orkney's Core Path Plan.

The Ministers responded to the request. They disclosed some information but withheld some on the basis that it was legal advice so exempt under FOISA. The Kennel Club was dissatisfied so requested a review. The Ministers responded, having considered the request under the EIRs rather than FOISA. They withheld information on the basis that it comprised internal communications.

The Kennel Club remained dissatisfied and applied to the Commissioner for a decision. The Commissioner investigated and found that the Ministers had responded to the Kennel Club's request for information properly, in accordance with the EIRs.

Relevant statutory provisions

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a), (b) and (c) of the definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (4)(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 23 July 2014, The Kennel Club made a request for information to the Scottish Ministers. It asked for all internal and external notes and communications relating to the review of Orkney's Core Path Plan since 1 November 2012.
2. The Ministers responded on 11 August 2014. They disclosed some information but stated that some was exempt under section 36(1) of FOISA, on the basis that it was legal advice and disclosure would breach legal professional privilege.
3. On 22 September 2014, The Kennel Club wrote to the Ministers, requesting a review of their decision. They believed there to be a strong public interest in disclosure of the information.
4. The Ministers notified The Kennel Club of the outcome of their review on 17 October 2014. The Ministers continued to withhold the information, but stated that this request fell to be considered under the EIRs as opposed to FOISA and that the exception in regulation 10(4)(e) applied to the information withheld. In taking this approach, they also applied the exemption in section 39(2) of FOISA.
5. On 8 April 2015, The Kennel Club wrote to the Commissioner. The Kennel Club applied 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. The Kennel Club stated it was dissatisfied with the outcome of the Ministers' review because they believed there to be a strong public interest in disclosure of the information requested. They also questioned the Ministers' decision to process the request under the EIRs.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that The Kennel Club made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.
7. On 16 April 2015, the Ministers were notified in writing that The Kennel Club had made a valid application. The Ministers were asked to send the Commissioner the withheld information. The Ministers 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 Ministers were invited to comment on this application and answer specific questions, with specific reference to their application of the EIRs and the requirements of regulation 10(4)(e) in this context.
9. Some additional information was supplied to The Kennel Club by the Ministers during the investigation. The remainder was withheld on the basis that regulation 10(4)(e) applied.

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 The Kennel Club and the Ministers. She is satisfied that no matter of relevance has been overlooked.

Background to request

11. The Kennel Club's request was prompted by its desire to know whether Orkney Islands Council had instigated a review of its Core Path Plan on its own initiative or whether it had been requested to carry out a review by the Ministers. Underlying this query was the interpretation of section 20(1) of the Land Reform (Scotland) Act 2003.¹

Handling in terms of the EIRs

12. The Ministers handled the request under the EIRs, having concluded that the information requested by The Kennel Club was environmental information, as defined in regulation 2(1) of the EIRs.
13. 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.
14. The Ministers submitted that the request sought all information in relation to a review under the Land Reform (Scotland) Act 2003 of the Orkney Core Path Plan. The Ministers considered this information to fall under the definition (c) of environmental information in

¹ <http://www.legislation.gov.uk/asp/2003/2/section/20>

regulation 2(1) of the EIRs. This includes within the definition of environmental information “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”.

15. The Ministers stated that the elements of the land and soil would be directly affected by both the initial Core Path Plan and any subsequent review of the network. The state of these elements of the environment would be impacted in terms of the development of new paths and maintenance of existing paths.
16. The Commissioner has considered the arguments presented by the Ministers and accepts that the information requested by The Kennel Club falls within the definition of environmental information and therefore concludes that the Ministers were correct, and indeed required, to consider this request under the EIRs.

Section 39(2) of FOISA – environmental information

17. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Ministers were entitled to apply the exemption to the withheld information, given her conclusion that it is properly classified as environmental information.
18. As there is a statutory right of access to environmental information available to The Kennel Club in this case, the Commissioner accepts, in all the circumstance, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing information under FOISA. Consequently, the Ministers were correct in applying this exemption to the information.

Searches

19. In its application to the Commissioner, The Kennel Club raised a concern that not all of the information that fell within the scope of its request had been identified by the Ministers.
20. The Ministers submitted that searches for information were carried out on their electronic data management system (ERDM) using the keywords “Orkney review” and “Orkney Core Path review”, which identified a volume of information. This information was then sifted and a judgement made about whether it was within the scope of the request, based on the title of the document and examination of the contents. This task was assigned to an individual who had knowledge of the subject area, specifically in relation to Core Path Plans. The Ministers stated that 16 documents were identified as being within scope: most of these, excluding the information withheld, were disclosed at request stage.
21. Additionally, officials who worked in the policy area were asked to conduct searches of their desktops, personal files and inboxes. The keywords “Orkney”, “core” and “core path plan” were used for searching.
22. The Commissioner has considered the searches conducted by the Ministers and is satisfied that these were adequate and proportionate, and could reasonably be expected to identify all of the information held by the Ministers and falling within the scope of The Kennel Club’s request.

Regulation 10(4)(e) of the EIRs (internal communications)

23. Under regulation 10(4)(e) of the EIRs, a public authority may refuse to make environmental information available to the extent that it involves making available internal communications. In order for information to fall within the scope of this exception, it need only be established that the information is an internal communication. If the Commissioner decides that a document is an internal communication, she will be required to go on to consider the public interest test.
24. The Ministers explained that the information withheld consisted of internal email exchanges and a redacted comment from within an internal analysis. The Ministers explained that all of the information withheld contained legal advice.
25. Having considered the information withheld by the Ministers, the Commissioner is satisfied that all of the withheld information comprises of internal communications and is therefore, subject to the exception in regulation 10(4)(e). She must therefore go on to consider whether, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception

The public interest test

The Kennel Club's submissions

26. The Kennel Club stated that it takes a great interest in access matters across Scotland and the UK as a whole, as around half of all visits to the countryside and urban greenspace are taken with a dog. Core paths are a key part of that network, so The Kennel Club is keen that these are administered lawfully without wasting public funds.
27. The Kennel Club argued that there was a strong public interest in disclosure of the withheld information, stating that disclosure would give Orkney Islands Council and the public the fullest publicly-funded knowledge about whether the Council's actions were lawful, without having to spend further public money on duplicating legal advice.
28. It went on to state that there was, in its view, an underlying principle that if the Ministers had legal advice that helped local Councils do their job effectively and openly with the full support of the electorate, that could also minimise the cost of each Council getting its own legal advice, then that advice should be shared.
29. The Kennel Club understood that local access officers were reluctant to undertake Core Path Plan reviews, due to uncertainty about the lawfulness of doing so, which the information being withheld might help to address.

The Ministers submissions

30. The Ministers stated that they recognised the public interest in enabling people to see legal advice provided on this topic, contributing to accountability and transparency, providing reassurance and helping to inform public debate. However, they also identified a strong public interest in maintaining legal professional privilege and ensuring confidentiality of communications between legal advisers and their clients. They stated there was a strong public interest in protecting the confidentiality of this information in order to ensure that the Scottish Government was able to consider legal advice privately and then ensure it provided its fully considered position consistent with that advice. They did not consider the public interest in maintaining the exception to be outweighed by the public interest in making the information available.

The Commissioner's view

31. The Commissioner has considered carefully the submissions made by both the Ministers and the Kennel Club alongside the withheld information, the contents of which she accepts convey the seeking and provision of legal advice.
32. In previous decisions, the Commissioner has acknowledged that there is a strong public interest in maintaining the right to confidentiality of communication on administration of justice grounds. Accordingly, while each case will be considered on its own merits, she is likely to order the disclosure of such communications in highly compelling cases only.
33. The Commissioner has considered The Kennel Club's comments and accepts that transparency, accountability and efficient use of public funds are strong public interest arguments for disclosure of this information. However, she does not consider these to be sufficiently strong to outweigh the considerable public interest in upholding legal advice privilege and withholding the information.
34. Having considered the withheld information and all relevant submissions, the Commissioner concludes, on balance, that the public interest in making this information available is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs. Therefore, she considers the Ministers to have been justified in withholding the information under that exception.

Decision

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

Appeal

Should either The Kennel Club 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.

Rosemary Agnew
Scottish Information Commissioner

27 July 2015

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

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- (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.

...

(4) A Scottish public authority may refuse to make environmental information available to the extent that

...

(e) the request involves making available internal communications.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info