

Decision Notice 145/2021

Wind farm projects

The Applicant

Public authority: Comhairle nan Eilean Siar

Case Ref: 202000632



Scottish Information
Commissioner

Summary

The Council was asked for information relating to windfarm projects.

The Council disclosed some information during the Commissioner's investigation but stated that no further information was held.

The Commissioner investigated and found that the Council had partially breached FOISA in responding to the request. This was because the Council did not disclose the information held at the time of the request. The Commissioner accepted that all the information held by the Council had been disclosed by the end of his investigation.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Notice that information is not held)

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 18 February 2020, the Applicant made a request for information to Comhairle nan Eilean Siar (the Council). The information requested was:

"All correspondence and documentation that you hold relating to

(i) any offer by Lewis Wind Power (or Stornoway Wind Farm Limited) to sell a 20% stake in Stornoway Wind Farm to the Council and/or the community; and

(ii) any offer by Lewis Wind Power (or Uisenis Power Limited) to sell a 30% stake in Uisenis Wind Farm to the Council and/or community.

Without prejudice to that generality, we request any undertaking or agreement entered into [sic] the Council in connection with the said offers."

2. The Council responded on 6 April 2020, notifying the Applicant in terms of section 17(1) of FOISA that no information was held in respect of part (i) of the request. In respect of part (ii) of the request the Council withheld one "Heads of Terms" document under section 33(1)(b)(Commercial interest and the economy) of FOISA, on the grounds that disclosure would prejudice commercial interests of a number of bodies.
3. On 8 April 2020, the Applicant wrote to the Council requesting a review of its decision on the basis that it felt that information was held by the Council in respect of part (i) of the request. The Applicant provided the Council with examples of where it believed there was confirmation that the Council is in at least discussions with third parties about the project. In addition, the Applicant did not accept that disclosure of the "Heads of Terms" document would prejudice commercial interests in respect of part (ii) of the request or that the Council had explained why the exemption applied.
4. The Council notified the Applicant of the outcome of its review on 28 April 2020. It upheld its application of sections 17(1) and 33(1)(b) of FOISA and provided further explanation behind its application of section 33(1)(b).

5. On 10 June 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated it was dissatisfied with the outcome of the Council's review because it did not believe that no info was held as regards point (i) of the request. With regard to point (ii) the Applicant believed that the "Heads of Terms" document should be disclosed and that no current commercial interests would be prejudiced by disclosure.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant 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 29 July 2020, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the document being withheld from the Applicant (the "Heads of Terms" document). The Council provided this 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 related to whether any further information may be held, what searches were carried out, and whether the "Heads of Terms" document actually fell within the scope of the request.
9. The Council's searches found two further documents falling within the scope of the Applicant's request and disclosed both of these to the Applicant during the investigation. The Council also stated that it now considered the "Heads of Terms" document to be outwith the scope of the request.
10. The Council was asked to carry out further searches, which it did, but no further information was located falling within the scope of the request.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.
12. The Commissioner will consider (a) whether the "Head of Terms" document falls within the scope of the request (and, if so, whether it is exempt from disclosure under section 33(1)(b) of FOISA) and (b) whether the Council carried out adequate searches to locate any information held within the scope of the request.

Does the "Heads of Terms" document fall within the scope of the request?

13. The Applicant considered the "Heads of Terms" document did fall within the scope of its request. The Applicant stated that interpreting its reference to "any offer" to mean a legally binding offer was too narrow an interpretation. The Applicant stated that the "Heads of Terms" document represented an outline agreement between parties and that it could not have come into existence without some form of (non-legally binding) offer, negotiation and acceptance. The Applicant therefore considered that the "Heads of Terms" document related to "any offer..." and that it was within the scope of its request.

14. The Commissioner has scrutinised the document in question. He notes that it is a discussion draft which is marked as “subject to contract”. The document is a summary of an option for equity participation only.
15. He must conclude that the document cannot be held to be “*relating to any offer by Lewis Wind Power (or Stornoway Wind Farm Limited) to sell a 20% stake in Stornoway Wind Farm to the Council and/or the community*” or “*relating to any offer made to sell a 30% stake in Uisenis Wind Farm to the Council and/or community*”.
16. The Council has confirmed that there has not at any time been such contract or offer made between itself and either Lewis Wind Power/Stornoway Wind Farm Ltd or Lewis Wind Power/Uisenis Power Ltd. The Commissioner therefore cannot accept that this document can be related to such an offer. It appears to be simply a draft proposal which was not taken any further.
17. The Commissioner has not been provided with evidence of any legally binding offer (or even any non-legally binding offer) between the Council and either of the named parties.
18. The Commissioner must therefore conclude that this “Heads of Terms” document falls outwith the scope of the request.

Section 17(1) - Information not held

19. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received. This is subject to qualifications, but these are not applicable here. If no such information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice in writing to that effect.

Submissions from the Applicant

20. The Applicant was of the view that the Council must hold further information falling within the scope of its request. The Applicant stated that in press statements and reports issued by the Council there were references to agreements between the Developer and the Council and Stornoway Trust.
21. The Applicant also provided the Commissioner with a copy of a document downloaded from the Council’s website which he believed fell within the scope of the request.

Submissions from the Council

22. The Council explained that the Stornoway Trust had negotiated an ownership stake of up to 20% of Stornoway Windfarm and that the Council had agreed with the Trust to explore the establishment of a joint venture vehicle to see how ownership stakes could be maximised on behalf of the communities of the Outer Hebrides. The Council stated that an offer had been made to the Stornoway Trust but it had not been shared with the Council.
23. The Council emphasised that it did not hold any documentation in relation to the offer between the Trust and Lewis Wind Power.

Searches carried out by the Council

24. The Council selected the oldest (18 July 2020) and most recent (14 December 2020) exchange server backups and searched within three mailboxes (for the Director, who had first-hand knowledge of any dealings between the Council and the wind farm developers, for the Strategy Manager, and for the relevant secretary) using three different search phrases, i.e. “Uisenis”, “Wind Farm” and “Lewis Wind Power”.

25. The Council also searched its it-unicitrix2 file server as this was the server used by the staff involved. The search phrases used were, "Lewis Wind Power", "Stornoway Wind Farm" and "Uisenis Power". The Council attached screenshots of the file server search results.
26. Thirty folders were thrown up in these electronic searches and the Council estimated that the folders contained about 2,000 documents. The Council stated that it would take a large amount of time for staff to go through those documents to determine whether or not any fell within the scope of the request.
27. By way of compromise, Council suggested it do a narrower electronic search, against the terms "Stornoway Wind Farm 20% share" and "Uisenis Wind Farm 30% share", and stated that colleagues in IT would conduct such reduced scope searches.
28. The Council advised that the various paper files relating to windfarm developments extended to four document boxes and that with all its staff mostly working from home, it was not reasonable or practicable for staff to be expected to attend the office in order to search those files. The Council suggested it would also possibly be excessive, in terms of time.
29. The searches produced one Tax Increment Financing document falling within the scope of the request. The Council provided a copy of this document to the Applicant.
30. On carrying out further searches, another document was found falling within the scope of the request, a Scottish Futures Trust document. The Council also provided a copy of this document to the Applicant.
31. With regard to the document which the Applicant found on the Council's website (as noted at paragraph 21 above), this prompted the investigating officer to check with the Council whether it had been overly narrow in its interpretation of the request. The Council advised that it had searched widely and had not been overly narrow in interpreting the request. It acknowledged, however, that this document should have been referred to in the original response.

The Commissioner's findings

32. The Commissioner has taken account of all the searches undertaken by the Council, both those conducted when responding to the request and the review requirement, and those conducted during his investigation. He notes that the documents found during the latter searches have been now disclosed to the Applicant.
33. However, he is of the view that the searches conducted in response to the initial request and the review requirement were inadequate. He notes the Council's submissions that staff were working from home and could not access the office, but it appears that all the searches that were required to be carried out were actually electronic searches, which could be carried out remotely. He therefore can find no reason why the Council could not have located the two documents found during his investigation and provided them to the Applicant at the time of the initial request or review.
34. The Commissioner has noted the Council's explanation that it was in fact the Stornoway Trust which had negotiated an ownership stake of up to 20% of Stornoway Windfarm. He has also taken into account the fact that the offer had been made to the Trust, but that the Trust had not, to date, shared this information with the Council.
35. It may be the case that the establishment of "a joint venture vehicle to see how ownership stakes could be maximised on behalf of the communities of the Outer Hebrides" had not moved forward, thus the Trust had not felt obliged to share its information with the Council.

36. The Commissioner must also take account of the fact that the Council has repeatedly stated that it has never entered into an agreement with either Stornoway Windfarm Ltd or Uisenis Power Ltd to buy a stake in either of the projects, nor received any offer from either party to sell any such offer to the Council.
37. If an offer was made to the community, via the Trust, and if this information has not been shared with the Council by the Trust, then the Council cannot be deemed to hold the information.
38. The Commissioner understands that the Applicant may believe that such information has been share by the Trust, but he has been provided with no evidence in support of this.
39. Therefore, having considered all relevant submissions and the terms of the request, the Commissioner is satisfied that the Council, by the end of his investigation, took adequate, proportionate steps to establish whether it held any information that fell within the scope of the request. He is satisfied that the searches which were carried out by the Council during his investigation would have been capable of identifying any information held and relevant to the request.
40. The Commissioner is therefore satisfied, on the balance of probabilities, that the Council does not hold any further information in addition to the two documents disclosed to the Applicant during his investigation.
41. However, he must find that the Council was incorrect to give notice at the time they did, in terms of section 17(1) of FOISA, that they did not hold the information requested, in response to the Applicant's application.

Decision

The Commissioner finds that Comhairle nan Eilean Siar (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that, by failing to identify and locate all of the information falling within the scope of the request at the time of handling, the Council failed to comply with section 1(1) and (4) of FOISA.

Given the information located during the investigation has now been disclosed, the Commissioner does not require the Council to take any action in respect of this failure in response to the Applicant's application.

Appeal

Should either the Applicant or the 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.

Margaret Keyse
Head of Enforcement

29 September 2021

Appendix 1: 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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

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