

Decision Notice



Decision 166/2013 Mr David Scott and Historic Scotland

Old Beacon, North Ronaldsay

Reference No: 201300576

Decision Date: 9 August 2013

www.itspublicknowledge.info

Rosemary Agnew

Scottish Information Commissioner

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Summary

On 18 December 2012, Mr Scott asked Historic Scotland for documentation relating to the restoration of the Old Beacon, North Ronaldsay submitted by the North Ronaldsay Trust (the Trust). Historic Scotland withheld the information on the basis that regulation 10(5)(f) of the EIRs applied.

Some documentation was disclosed to Mr Scott during the course of the investigation.

Following an investigation, the Commissioner found that Historic Scotland had failed to deal with Mr Scott's request for information in accordance with the EIRs, by incorrectly withholding the information on the basis that regulation 10(5)(f) applied. She required Historic Scotland to provide Mr Scott with the information requested.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a) and (f) of definition of "environmental information"); 5(1), (2)(b) and (3) (Duty to make environmental information available on request); 10(1), (2) and (5)(f) (Exceptions from duty to make environmental 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 18 December 2012, Mr Scott wrote to Historic Scotland, requesting a report submitted to it by the North Ronaldsay Trust relating to the Old Beacon on North Ronaldsay.
2. Historic Scotland responded on 11 January 2013, informing Mr Scott that it was handling his request in terms of the EIRs and relying on regulation 10(5)(f) to withhold the information. Historic Scotland indicated to Mr Scott that the supplier of the information might consider releasing it to him, should he contact them direct. Historic Scotland provided contact details.
3. On the same date, Mr Scott wrote to Historic Scotland requesting a review of its decision. In particular, Mr Scott felt there was a significant public interest to be served in disclosing this information.



4. Historic Scotland notified Mr Scott of the outcome of its review on 7 February 2013, upholding its decision to withhold the information under regulation 10(5)(f). It highlighted that the report had been passed to it voluntarily, with no expectation that it would be released into the public domain. Historic Scotland also set out its consideration of the public interest.
5. On 28 February 2013, Mr Scott wrote to the Commissioner, stating that he was dissatisfied with the outcome of Historic Scotland'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.
6. The application was validated by establishing that Mr Scott made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. Historic Scotland is an Executive Agency of the Scottish Ministers (the Ministers). Subsequent references to submissions received from Historic Scotland are therefore references to submissions made by the Ministers' Freedom of Information Unit on behalf of Historic Scotland.
8. On 4 March 2013, Historic Scotland was notified in writing that an application had been received from Mr Scott and was asked to provide the Commissioner with any information withheld from him. Historic Scotland responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted Historic Scotland, giving it opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, Historic Scotland was asked to justify its reliance on regulation 10(5)(f) of the EIRs.
10. On review of the withheld information, the investigating officer noted that a number of the documents withheld (appended to the report itself) were not authored by the supplier of the information. Some of these were authored by Historic Scotland itself. On review of this information, Historic Scotland disclosed these particular documents to Mr Scott during the investigation.
11. The information still withheld is considered in the Commissioner's analysis and findings below.



Commissioner's analysis and findings

12. 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 her by both Mr Scott and Historic Scotland. She is satisfied that no matter of relevance has been overlooked.

Environmental Information

13. Historic Scotland dealt with Mr Scott's request on the basis that the information requested was environmental information, as defined in regulation 2(1) of the EIRs. The information relates to the current condition, surrounding environment, significance and conservation of the Old Beacon. Bearing in mind the nature of the structure, the Commissioner is satisfied that all of this falls within paragraphs (a) and (f) of the definition of environmental information contained in regulation 2(1) of the EIRs.

Application of regulation 10(5)(f)

14. Regulation 10(5)(f) of the EIRs is set out in full in the Appendix.
15. Regulation 10(2) of the EIRs provides that this exception must be interpreted in a restrictive way and that the public authority shall apply a presumption in favour of disclosure. This exception is also subject to the public interest test in regulation 10(1)(b).
16. The Commissioner's guidance on regulation 10(5)(f)¹, states that certain points should be addressed in considering whether this exception applies. These include:
- i. Was the information provided by a third party?
 - ii. Was the provider, or could the provider be, required by law to provide it?
 - iii. Has the provider consented to disclosure?
 - iv. Would release of the information cause, or be likely to cause, substantial harm to the interests of the provider?
 - v. Is the information otherwise publicly available?

Was the information provided by a third party?

17. The Old Beacon is a scheduled monument and is of national importance as one of the first lighthouses to be constructed by the Northern Lighthouse Board. The Trust wishes to consolidate the beacon and bring the associated cottages back into use. Historic Scotland has agreed in principle to the scheme and the provision of grant assistance. However, there is clear evidence of some opposition to suggested proposals for the restoration.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section33/Section33.aspx>



18. Historic Scotland explained that it came to have this information as a consequence of asking the Trust for an update on progress with the scheme. As a result of this request, the Trust supplied a copy of the current conservation plan. Historic Scotland provided copies of the relevant correspondence.
19. The Commissioner is satisfied that the information under consideration was provided to Historic Scotland by a third party, namely the Trust.

Was/could the provider be required by law to provide the information?

20. Historic Scotland explained that, at the time of Mr Scott's request, it had no application for a grant or scheduled monument consent in relation to the Old Beacon.
21. Historic Scotland explained that there was no requirement for the Trust to supply the information by law. It explained that it could potentially have been submitted as part of an application for scheduled monument consent: it could not, however, be required as part of such an application. In any event, as indicated above, Historic Scotland had no such application before it when it dealt with the request, and might never have one.
22. The Commissioner accepts that the Trust, in providing this report, was not (and could not have been put) under any legal obligation to supply the information.

Has the provider consented to disclosure?

23. Historic Scotland provided the Commissioner with documentary evidence showing that consent had been sought from the provider of the information, and declined.

Would release of the information cause, or be likely to cause substantial harm to the interests of the provider? And was the information otherwise publicly available?

24. Historic Scotland explained that the Trust believed its plans to conserve the Old Beacon had been consistently undermined by individuals in the local community and beyond. The Trust believed this had made the task of conserving the Old Beacon more difficult and had delayed progress. Historic Scotland noted that there had been several letters in the Orkney press critical of the project and that it had been contacted about the project by several regular or frequent correspondents. These correspondents had different aims from those of the Trust for the conservation of the Old Beacon – consequently, although the withheld information might seem innocuous, it was not considered so by the opposing parties.



25. Historic Scotland submitted that disclosure would cause substantial harm to the scheduled monument consent process, and potentially to the historic environment. It believed disclosure would be likely to harm relations between it and the Trust significantly – Historic Scotland would appear untrustworthy and therefore the Trust would be less willing to discuss its plans with the authority: it submitted that this had been the effect of discussions to date with the Trust and its advisers on disclosure of the information. If the Trust believed that the necessary discussions would be the subject of “constant and critical scrutiny from third parties”, Historic Scotland believed it would be unlikely to be able to discuss issues arising from the conservation plan in a free and open manner as the scheme developed and the consent process progressed, to the inevitable detriment of that process.
26. Historic Scotland described elements of the withheld information, relating to the consideration of options, as the “private thinking space” of the Trust and its professional advisers, which it considered to be of particular sensitivity. It highlighted the risks to the project in a challenging financial climate – and to the monument itself, in the absence of resources for its protection.
27. The Commissioner understands Historic Scotland’s concerns about exacerbating the existing controversy in relation to the Old Beacon and making the implementation of the Trust’s plans for the building more difficult. Clearly, these are things which would be contrary to the Trust’s interests (potentially, to a significant degree). However, in reaching a conclusion on whether regulation 10(5)(f) applies, she must consider the impact of disclosing the actual information withheld in this case, in the context in which that information was requested. In other words, would the harmful effects Historic Scotland has put forward follow, or be likely to follow, from that disclosure?
28. The Commissioner is aware that the report which is subject to this decision appears to have been presented at a public meeting and that its proposals appear to have been discussed more widely in the local community². Historic Scotland itself recognises that the general intentions of the Trust in regard to the Old Beacon are well known on the island (and indeed have been publicised by the Trust itself)³.
29. The Commissioner has considered the content of the information withheld. With the exception of elevations and plans of the proposals and of the existing site (to which Historic Scotland claim there is an issue surrounding copyright (addressed below)), she is of the view that much of that content is compiled from information which is already in the public domain. For example, the report contains information relating to the history of the Old Beacon, its current state, the regulatory framework within which conservation must take place and its significance to the heritage of the island.

² <http://www.lettersfromnorthronaldsay.co.uk/> (paragraphs 22-23 of blog 17 July 2012)

³ <http://www.northronaldsaytrust.co.uk/Old%20Beacon.html>



30. The Commissioner has also considered the circumstances within which this request was made. There is clear evidence that the intentions of the Trust are already in the public domain and there is also clear evidence of an existing conflict between the Trust and members of the community of North Ronaldsay in relation to this issue. Having considered the information and the surrounding circumstances, the Commissioner cannot accept that disclosure of the content of these documents would – or would be likely to – exacerbate this existing conflict.
31. The Commissioner has noted the comments made by Historic Scotland regarding the effect of disclosure on relations between it and the Trust. It may be understandable that the Trust's immediate reaction to the prospect of disclosure is a degree of wariness towards Historic Scotland, given the controversy surrounding the project. On the other hand, the Trust must understand that Historic Scotland is obliged to consider whether requested information can be disclosed, and that disclosure in response to a legal requirement hardly makes it untrustworthy.
32. The Commissioner would also emphasise that it does not follow from the disclosure of this particular information that the content of future discussions on scheduled monument consent and related matters will necessarily require to be disclosed: that would require to be considered in the context of a request for that information, should one be made, at the time it was made. Historic Scotland has emphasised the importance of free and open discussion in the context of the scheduled monument consent process. Given that importance, and the circumstances of this particular case as considered above, the Commissioner does not believe it follows from disclosure of the information withheld here that the Trust would be likely to be less forthcoming in such discussions should it take the further step of applying for scheduled monument consent. Equally, given the circumstances considered above, she does not believe that any decision *not* to take that further step could reasonably be described as a consequence of disclosure of this particular information.
33. Therefore, taking account of the particular circumstances of this case, the Commissioner does not accept that disclosure of the withheld information would, or would be likely to, prejudice substantially the interests of the person providing the information. Having reached that conclusion, the Commissioner finds that Historic Scotland was incorrect in its application of regulation 10(5)(f) to the withheld information on this occasion.
34. As the Commissioner does not accept that the exception contained in regulation 10(5)(f) applies, she is not required to consider the public interest test.



Copyright

35. Historic Scotland made a general comment within its submissions to the Commissioner about the architectural drawings contained in this report being subject to copyright.
36. Section 50 of the Copyright, Designs and Patents Act 1988 Act states that if a particular "act" (e.g. the release of information in response to an FOI request) is required by an Act of Parliament, then the doing of that act does not infringe copyright. However, **the usual copyright restrictions will apply to any subsequent use of the information by the requester**. Specific provisions have already been put in place regarding the "act" of replying to information requests under FOISA (see article 3 of the Freedom of Information (Scotland) Act 2002 (Consequential Modifications) Order 2004). The Commissioner would expect the same principle to apply to requests made and responded to under the EIRs. In any event, regulation 5(3) of the EIRs provides that any enactment or rule of law which would prevent the making available of information in accordance with the EIRs shall not apply.

DECISION

The Commissioner finds that Historic Scotland failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Scott. The Commissioner finds that Historic Scotland was not entitled to withhold the information on the basis of the exception in regulation 10(5)(f), and therefore failed to comply with regulation 5(1) of the EIRs in responding to the request.

The Commissioner therefore requires Historic Scotland to provide Mr Scott with the withheld information by 23 September 2013.

Appeal

Should either Mr Scott or Historic Scotland 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.

Margaret Keyse
Head of Enforcement
9 August 2013



Appendix

Relevant statutory provisions

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;

...

(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.



- (3) Any enactment or rule of law which would prevent the making available of information in accordance with these Regulations shall not apply.

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-
- ...
- (f) the interests of the person who provided the information where that person-
 - (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
 - (iii) has not consented to its disclosure; or
- ...