

# Decision Notice

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**Decision 166/2018: Mr D and Aberdeen City Council**

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**Planning application report**

Reference No: 201800710

Decision Date: 23 October 2018



Scottish Information  
Commissioner

## Summary

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In January 2018, the Council approved plans to build a stadium at Kingsford, Aberdeen, which would be the new home of Aberdeen FC. The Council was asked for a copy of the original planning application report for the Kingsford Stadium development.

The Council said that some information from the report was already in the public domain and that the remainder could not be disclosed as it comprised internal communications (and the public interest favoured withholding the information).

The Commissioner investigated and found that the Council responded to Mr D's request for information in accordance with the EIRs.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of 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

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1. In January 2017, Aberdeen FC Community Trust and Aberdeen Football Club applied for planning permission from Aberdeen City Council (the Council) to move the club's stadium from Pittodrie to a stadium in Kingsford. The proposed development received planning permission from the Council in April 2018. "No Kingsford Stadium Limited", a campaign representing local residents opposed to the development, subsequently applied to the Court of Session seeking a judicial review of the Council's decision to grant planning permission.
2. On 1 February 2018, Mr D made a request for information to the Council. He asked for:  
*... a copy of the original planning application report for the Kingsford Stadium development.*  
*This is the document which contains the officer's original recommendation for refusal and that was withdrawn in October. The report had been due to be presented to a special Council meeting.*
3. The Council responded on 27 February 2018 and told Mr D that some information from the report was already in the public domain as it had been included in later reports. As this information was already publicly available and easily accessible to Mr D, the Council did not have to comply with that part of Mr D's request (regulation 6(1)(b) of the EIRs).
4. It went to explain that other parts could not be disclosed because they comprised internal communications, which were excepted from disclosure under regulation 10(4)(e) of the EIRs.
5. On 21 March 2018, after further communications with the Council which he later confirmed were not intended to be new information requests, Mr D wrote to the Council requesting a review of its decision. He was of the view that those parts of the draft report not already in

the public domain should be disclosed, as a complete record of the recommendation of refusal and the underlying reasons. He still sought the report in question, even if it was never completed.

6. The Council notified Mr D of the outcome of its review on 19 April 2018. The review upheld the original decision.
7. On 25 April 2018, Mr D 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 D stated he was dissatisfied with the outcome of the Council's review because he did not believe disclosure of the draft report in full would have hampered the Council's ability to draft and refine the document. He also considered it was in the public interest for the report to be disclosed in full.

## **Investigation**

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8. The application was accepted as valid. The Commissioner confirmed that Mr D 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.
9. On 28 May 2018, the Council was notified in writing that Mr D had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr D and subsequently provided it. The case was then allocated to an investigating officer.
10. 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, with particular reference to its application of regulation 10(4)(e) of the EIRs to the withheld information.
11. Mr D was also asked for, and provided, comments on the public interest in disclosing the full report.

## **Commissioner's analysis and findings**

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12. 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 D and the Council. He is satisfied that no matter of relevance has been overlooked.

### **Application of the EIRs**

13. The requested information relates to a development proposal of major local significance (Aberdeen Football Club's move from Pittodrie to Kingsford). It is clear to the Commissioner that the information, in relating to the elements of the environment (specifically land and landscape) and measures affecting or likely to affect those elements, is environmental information as defined in paragraphs (a) and (c) of the definition in regulation 2(1) of the EIRs. Mr D has not challenged the Council's decision to deal with his request under the EIRs and the Commissioner will consider the application in what follows solely in terms of the EIRs.
14. In terms of regulation 5(1) of the EIRs, a Scottish public authority that holds environmental information is required to make it available when requested to do so. This obligation is subject

to various other provisions in terms of regulation 5(2)(b), including the exceptions in regulation 10. A Scottish public authority is required to interpret these exceptions restrictively (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). All of the exceptions are subject to the public interest test in regulation 10(1)(b).

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

15. 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, he will be required to go on to consider the public interest test.

#### *Submissions from the Council*

16. The Council stated that the then Interim Head of Planning and Sustainable Development and the Chief Executive met with representatives of the applicant, Aberdeen Football Club, to discuss the application on 3 October 2017. At this meeting, the representatives were not provided with a copy of, or shown, a physical or electronic copy of the draft report or draft recommendation.
17. It is normal practice, the Council explained, for Council officers to meet with planning applicants at various stages of the application process to advise them of its progress and to discuss any matter arising from it, including, where the case officer is able to do so at the time of the meeting, an indication of their professional view around what their proposed recommendation will be. In this instance, draft recommendations were verbally discussed.
18. The Council took issue with Mr D's view that, had the application not been withdrawn, the very same report would have been published and open to scrutiny. The Council reiterated that the report was a draft, which was not complete. Had the applicants not requested that their application be withdrawn from the agenda for the Council meeting, the report would have been subject to further work, internal review, refinement and agreement before being submitted for publication.
19. Having considered the terms of the request, the content of the draft report and the Council's submissions, the Commissioner is satisfied that the withheld information comprises internal communications for the purposes of the EIRs and is, therefore, subject to the exception in regulation 10(4)(e).

#### *The public interest test*

20. Having accepted that the exception in regulation 10(4)(e) applies, the Commissioner is required to consider the public interest in regulation 10(1)(b) of the EIRs. This provides that a Scottish public authority may only withhold information where an exception applies and, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

#### Submissions from Mr D

21. Mr D submitted that it was important that the public could see that the planning system managed by the Council was transparent.
22. Mr D noted that, in the case in question, the Council was due to hold a special meeting to make a decision about Aberdeen Football Club's planning application. His understanding of the timeline of events was that the Council wrote a report, which contained a

recommendation for refusal, and then a meeting took place between the Council's Chief Executive and the Head of Planning with representatives of Aberdeen Football Club, at which it learned of the recommendation to refuse. Shortly afterwards, the application was withdrawn. The special meeting of Councillors at which a decision was due to be made was cancelled. Later, the application was resubmitted, a second report recommended approval and Councillors granted permission at a special meeting.

23. Mr D believed the first report would tell the public why the Council thought initially the application should be refused. It would also reveal the key differences between the Council's view of the first application and the subsequent one. Without disclosure, in his view, there would be no transparency.
24. Mr D questioned whether the document could be considered a work in progress, if the planning officer considered they were in a position to make a recommendation based on its content. If it were a draft, he believed it could be released in a redacted format. By way of what he considered to be a comparator, Mr D stated that the previous year the Council had received a request for the release of a lengthy report about another planning issue and had made it available in this way.
25. Mr D concluded by stating that while his principle point was that transparency should apply to all planning applications, he noted that this particular application had drawn thousands of submissions, great community interest and might also fall subject to a judicial review (as noted earlier, during the investigation, an application for judicial review was in fact made). He believed the Council should show its commitment to transparency by releasing the initial report.

#### Submissions from the Council

26. The Council recognised that making the information available might serve a general public interest by demonstrating transparency in its decision-making and in securing transparency and accountability in showing how planning applications are processed and how Council officers developed their recommendations. The Council accepted that there was a high degree of public and media interest in this particular development.
27. However, the Council considered it had addressed this public interest by making all documents relevant to the application available via the planning portal for public inspection. The Council stated that the public had been given the opportunity to comment at appropriate times, while the planning application progressed. In addition to information on the portal, public engagement opportunities included consultation periods, two pre-determination hearings (held in public) and pre-application consultation events (organised by the Aberdeen Football Club).
28. The Council explained that the draft report intended for the Council meeting in October 2017 was never completed and submitted that releasing draft planning reports into the public domain could well result in officers being less willing to be full and frank with their internal communications. Officers and the planning authority rely on draft reports by way of internal communications, it explained, to evaluate and make informed decisions on planning applications. If officers no longer felt they could produce draft reports without these being circulated to the public, this would have a detrimental effect on the decision-making process.
29. The Council stated that this draft report would have required further revision prior to publication and would need to have gone through a process of internal approval. The draft report had not been finalised or agreed, and so could not reasonably be considered to

represent the view of the Council (as planning authority), but rather the unfinished work of a planning officer.

30. The Council explained that the draft report was based on earlier evidence, prepared before the submission of additional supporting information. This additional information resulted in further consultation and a second pre-determination hearing being held in public. As a result, the information within the draft report was not a material consideration and therefore was not – and could not be – considered as part of the planning application.
31. The Council submitted that planning officials must be able to determine each application on its own merits, taking into account the development plan and all material considerations. Planning officers rely on developing their judgement on planning applications through draft reports and open and frank discussions. The Council believed it was in the public interest to ensure that, as planning authority, it could produce high quality reports effectively. If planning officers were unable to develop their judgement in an open and frank manner, without fear of this being released to the public, it would cause harm to planning decisions and in turn reduce the quality of decision making relied on by the public. It is also in the public interest, the Council stated, for published reports to be correct and accurate.
32. The Council emphasised the need for the public to have confidence in its planning decisions and be able to rely on the professional judgement of its planning officers. It also emphasised the extent to which the process was open to public scrutiny.
33. In conclusion, the Council considered the public interest in making internal communications (such as draft reports) available was outweighed by the greater interest in non-disclosure, thereby reserving officers' ability to draft and refine working documents through the life of a planning application and ahead of publication, without fear of such drafts later being in the public domain. Officers should be free to change their minds before coming to a final decision; to make draft documents such as this available would prejudice their ability to do so.

#### The Commissioner's findings

34. The Commissioner has taken account the submissions made by both the Council and Mr D. He recognises the significant public interest in transparency and accountability in the decision-making process and acknowledges the public interest in understanding how a particular decision was arrived at. There is a particularly strong public interest in ensuring that the planning process is open to public scrutiny, but this is recognised to a large extent in the statutory framework.
35. The Council's arguments in favour of maintaining the exception are founded on the protection of thinking space and the ability to have full and frank discussions without fear that such information might be released into the public domain. The Council is concerned that planning officers would not be so forthright in offering up their initial views and suggestions for deliberation, should these be open to critical scrutiny further down the line.
36. In reaching his conclusion, the Commissioner has noted the extent to which information about both the initial application and the subsequent application has been made available to the public, through the Council's own planning portal. He also notes that the opportunities for members of the public to comment on and discuss matters at several meetings. It is the Commissioner's view that this goes a reasonable way towards satisfying the public interest.
37. The Commissioner acknowledges that there might also be a public interest in knowing why the initial recommendation on the first application was to refuse while approval was

recommended for the second. However, the recommendation of refusal was in a draft and it is far from certain that this would have been the final recommendation in relation to the original application.

38. It is clear that the initial draft report could not explain why the planning officers changed their position on approval, even if we could assume it could be argued that the two applications were directly comparable in all material respects. It must be acknowledged that the Council was obliged to consider the second application on its own merits, and not by way of comparison with the first.
39. With regard to the case identified by Mr D as a comparator, having considered the circumstances of that case, the Commissioner notes that this related to a fundamentally different matter (how much of a report presented to committee, on a matter under active consideration, required to be made available to the public). This decision concerns a draft which never went to committee, and is therefore not truly comparable.
40. 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, he considers the Council to have been justified in refusing to make the information available.

## Decision

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The Commissioner finds that Aberdeen City Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr D.

## Appeal

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Should either Mr D 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**

**23 October 2018**

### 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;

...

(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.

...

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