

Decision Notice



Decision 168/2010 Mr Gordon Taylor and Transport Scotland

Land acquisition for Glasgow Airport Rail Link

Reference No: 201000835

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Summary

Mr Taylor requested from Transport Scotland information relating to land acquired for the aborted Glasgow Airport Rail Link (GARL). Transport Scotland responded by releasing some of the information while withholding the remainder under certain exceptions in the EIRs. Following a review, as a result of which Transport Scotland continued to withhold the information but changed the exceptions it was relying on, Mr Taylor remained dissatisfied and applied to the Commissioner for a decision in respect of Transport Scotland's handling of part of his request (in respect of the purchase prices of certain plots).

Following an investigation, the Commissioner found that Transport Scotland had been correct to deal with the prices as environmental information under the EIRs, but also that it had not been entitled to withhold those prices under the EIRs as they had been in the public domain at the time Transport Scotland dealt with Mr Taylor's request. Given that the information was already accessible to Mr Taylor, the Commissioner did not require Transport Scotland to take any action.

Relevant statutory provisions and other sources

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definition of "environmental information"); 5(1) and (2)(b) (Duty to make environmental information available on request); 9(1) (Duty to provide advice and assistance); 10(1), (2) and (5)(d) (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. In 2001, the Scottish Ministers commissioned consultants to investigate the possibility of building a rail link to Glasgow airport. Under the Glasgow Airport Rail Link (GARL) Act 2007, Strathclyde Partnership for Transport (SPT) became the “Authorised Undertaker” for the GARL project, which involving upgrading existing track and creating a new spur line to the airport. The land on which the new line was to be built had to be purchased by SPT from existing owners as part of the project. Transport Scotland, as the national transport agency for Scotland, took over direct responsibility for the GARL project in March 2008 and the project was cancelled in September 2009.
2. On 5 February 2010, Mr Taylor wrote to Transport Scotland asking what land was acquired for the aborted GARL and how much the land was bought for from the original owners.
3. Transport Scotland responded on 18 February 2010, explaining that as the information he had requested fell within the definition of “environmental information” contained in regulation 2(1) of the EIRs, it was required to deal with the information under the EIRs. Accordingly, it was applying an exemption in section 39 of FOISA (wrongly cited as section 39(1)). It advised that certain specified plots had been acquired at the point of cancellation. Transport Scotland also provided prices agreed in respect of certain plots, while withholding that information for the remainder: in respect of some of these it claimed that the prices were not yet agreed and therefore regulation 10(4)(d) of the EIRs applied, while (referring to a confidentiality agreement) it claimed that regulation 10(5)(f) applied in respect of the others.
4. On 19 February 2010, Mr Taylor wrote to Transport Scotland requesting a review of its decision. In particular, he drew Transport Scotland’s attention to the lack of information it had provided, commenting on the public interest in knowing how much compensation landowners had received for giving up land for such a project.
5. Transport Scotland notified Mr Taylor of the outcome of its review on 23 March 2010, indicating it was upholding its original decision and providing further reasoning. Where it had applied regulation 10(4)(d) it now applied regulation 10(4)(a) (on the basis that it did not hold the information), while it applied regulation 10(5)(d) (again referring to confidentiality) in respect of the information previously withheld under regulation 10(5)(f).
6. On 19 April 2010 Mr Taylor wrote to the Commissioner, stating that he was dissatisfied with the outcome of Transport Scotland’s review (insofar as it related to the information now withheld under regulation 10(5)(d) of the EIRs) 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.
7. The application was validated by establishing that Mr Taylor had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.



Investigation

8. Transport Scotland is an agency of the Scottish Ministers and, in line with agreed procedures, the Ministers were notified in writing on 16 June 2010 that an application had been received from Mr Taylor and were asked to provide the Commissioner with any information withheld from him. The Ministers, on behalf of Transport Scotland, responded with the information requested and the case was then allocated to an investigating officer. Subsequent references to communications with Transport Scotland should be read as relating to communications with the Ministers acting on Transport Scotland's behalf.
9. The investigating officer subsequently contacted Transport Scotland, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. Transport Scotland was asked to justify its reliance on any provisions of FOISA and the EIRs it considered applicable to the information requested, with particular reference to regulation 10(5)(d) of the EIRs.
10. Transport Scotland responded, confirming it wished to rely on the exemption in section 39(2) of FOISA. In respect of the plots which were the subject of Mr Taylor's application, it continued to rely on regulation 10(5)(d) of the EIRs and supplied arguments in support of this position.
11. Following further communication between the investigating officer and Transport Scotland, it was discovered that the price paid for the 3 plots was in fact already in the public domain, on the Registers of Scotland website, and had been at the time Transport Scotland received Mr Taylor's request. Transport Scotland released this information to Mr Taylor on 9 September 2010, providing him with the relevant links to the website and apologising for its earlier failure to do so.

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 submissions made to him by both Mr Taylor and Transport Scotland and is satisfied that no matter of relevance has been overlooked.

Section 39(2) of FOISA – environmental information

13. In this case, Transport Scotland applied the exemption in section 39(2) of FOISA. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs, which is reproduced in the Appendix below. The Commissioner has set out his thinking on the relationship between FOISA and the EIRs in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland* and need not repeat it here.



14. Mr Taylor's request relates to information concerning land purchased for the aborted Glasgow airport rail link (a large public infrastructure project), in particular the prices or compensation paid to the previous owners. Given the subject matter of the request, the Commissioner agrees with Transport Scotland that any information held in relation to it would fall within paragraph (c) of the definition of environmental information contained in regulation 2(1) of the EIRs, being information on measures affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) of the definition, in particular land or landscape. As he is satisfied that Transport Scotland was correct to conclude that any information falling within the scope of the request would be environmental information, he is also satisfied that the information was properly considered to be exempt under section 39(2) of FOISA.
15. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner accepts that the public interest in maintaining this exemption and in dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. Consequently, the Commissioner accepts that Transport Scotland was correct to withhold the information under section 39(2) of FOISA and deal with the request under the EIRs. He has therefore proceeded to consider this case in what follows solely in terms of the EIRs.

Regulation 10(5)(d) of the EIRs – confidentiality provided for by law

16. The exception in regulation 10(5)(d) provides that 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 confidentiality of the proceedings of any public authority where such confidentiality is provided for by law.
17. As with all of the exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be released unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
18. In many cases where this exception will apply, there will be a specific statutory provision prohibiting the release of the information. However, the Commissioner also acknowledges that there may be cases where the common law of confidence will apply to the relevant proceedings: referring to a confidentiality agreement between the seller and SPT, Transport Scotland considered this to be such a case.
19. In this case, however, it is clear that the information which is the subject matter of Mr Taylor's application was in fact available to the public at the time Transport Scotland received his request. The Commissioner fails to see how the disclosure of information which was not itself inaccessible in any meaningful sense could have been capable of causing prejudice, substantial or otherwise, to the confidentiality of any proceedings. In fact, the Commissioner fails to see how the information in question, being generally available at the time, could have been properly withheld under any of the exceptions in regulation 10 of the EIRs.



20. Clearly also, Mr Taylor did not know exactly where to find the information he was seeking. Transport Scotland did, however (or at least should have done), and if it did not intend to supply the information it should have provided Mr Taylor with advice and assistance as to where he could locate it. In failing to do either, Transport Scotland failed to comply with regulations 5(1) and 9(1) of the EIRs.
21. Given Transport Scotland's response to Mr Taylor on discovering that the information was available on the Registers of Scotland website, and noting that its practice in dealing with information requests has been the subject of a recent assessment by his Office, the Commissioner does not require Transport Scotland to take any further steps in relation to this case.

DECISION

The Commissioner finds that (in respect of the subject matter of Mr Taylor's application to him) Transport Scotland complied with Part 1 of the Freedom of Information (Scotland) Act 2002, in particular by withholding the relevant information under section 39(2).

The Commissioner also finds, however, that Transport Scotland failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Taylor. In purporting to withhold information which was in fact in the public domain, Transport Scotland failed to comply with regulation 5(1) of the EIRs. In failing to advise Mr Taylor where the relevant information might be found, Transport Scotland failed to comply with regulation 9(1) of the EIRs. As Mr Taylor has since been provided with both the requested information and details of where it might be found online, the Commissioner does not require Transport Scotland to take any action in respect of these failures in response to Mr Taylor's application.

Appeal

Should either Mr Taylor or Transport 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 notice.

Kevin Dunion
Scottish Information Commissioner
22 September 2010



Appendix

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.

...

- (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

-

- (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.

...

9 Duty to provide advice and assistance

(1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...



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-
 - (d) the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law;

...