

Decision Notice

Decision 170/2017: Mr Simon Boparai and Inverclyde Council

Reports presented to Council Committee

Reference No: 201700937

Decision Date: 16 October 2017



Scottish Information
Commissioner

Summary

The Council was asked for reports presented to a Council Committee. The Council withheld the information under a number of exceptions in the EIRs. During the investigation, the Council amended its position and confirmed that it no longer considered any exception to apply to some of the information.

The Commissioner accepted that the Council was entitled to withhold some of the information under the exception relating to internal communications. He also found that the Council had incorrectly withheld other information without applying any exceptions. He required the Council to disclose the wrongly withheld information to Mr Boparai.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a), (c) and (f) of “environmental information”); 5(1) and (2)(b) (Duty to make environmental information available 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.

Local Government (Scotland) Act 1973 section 50A (Admission to meetings of local authorities)

Background

1. On 2 March 2017, Mr Boparai made a request for information to Inverclyde Council (the Council). Mr Boparai requested the reports concerning the Clune Park estate in Port Glasgow, presented to the Council’s Education and Communities Committee on 22 November 2016, 17 January 2017 and 7 March 2017.
2. The Council responded on 23 March 2017. It informed Mr Boparai that the information was environmental information and was excepted from disclosure under the exceptions in regulations 10(5)(d) and 10(5)(e) of the EIRs.
3. On 23 March 2017, Mr Boparai wrote to the Council, requesting a review of its decision. In his view, the public was entitled to see the information.
4. The Council notified Mr Boparai of the outcome of its review on 24 April 2017. The Council upheld its decision that the information was excepted from disclosure in terms of regulation 10(5)(d) of the EIRs. At this stage, the Council informed Mr Boparai that it also considered the information to be excepted from disclosure in terms of regulations 10(4)(e) and 10(5)(b) of the EIRs. The Council no longer sought to rely on the exception in regulation 10(5)(e).
5. On 24 May 2017, Mr Boparai 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 Boparai stated he was dissatisfied with the outcome of the Council’s review because he did

not consider that the exceptions applied by the Council could cover every word within the reports. He also considered the public had a right to know who was responsible for public money having been, in his view, squandered on an unsuccessful court case¹. Additionally, he queried whether the request had been properly dealt with under the EIRs rather than FOISA.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Boparai 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 7 June 2017, the Council was notified in writing that Mr Boparai had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr Boparai. The Council 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 Council was invited to comment on this application and answer specific questions, focusing on the requirements of the exceptions cited in its review outcome.
9. The Council responded, providing submissions on its application of the exceptions in regulations 10(4)(e) (internal communications) and 10(5)(b) (prejudice to the course of justice) of the EIRs. At this stage, the Council stated that it no longer wished to rely on the exception in regulation 10(5)(d) of the EIRs.
10. During the investigation, the investigating officer pointed out that some of the information contained within the withheld reports was already in the public domain. The Council reconsidered its position in relation to information of this nature and no longer sought to apply any exceptions in the EIRs to such information.

Commissioner's analysis and findings

11. 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 Mr Boparai and the Council. She is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

12. In his application to the Commissioner, Mr Boparai queried whether the request had been correctly handled under the EIRs rather than FOISA.
13. "Environmental information" is defined in regulation 2(1) of the EIRs. The relevant parts of the definition are reproduced in Appendix 1 to this decision.
14. In the Commissioner's view, the information requested by Mr Boparai is clearly environmental and falls within the definition of environmental information in regulation 2(1) of the EIRs. It concerns a major urban regeneration proposal, including the proposed demolition of existing buildings. The information contains a significant consideration of

¹ <https://www.scotcourts.gov.uk/search-judgments/judgment?id=babe1fa7-8980-69d2-b500-ff0000d74aa7>

physical and social conditions in the area, including the condition of housing. The Commissioner is satisfied that the information falls (in particular) within paragraphs (a), (c) and (f) of the definition of “environmental information” in regulation 2(1).

15. The Commissioner is satisfied, therefore, that the Council correctly interpreted the request as one seeking environmental information and correctly dealt with the request under the EIRs. The Commissioner will therefore consider the Council’s handling of the request in what follows solely in terms of the EIRs.

Information withheld where no exceptions applied

16. As noted above, during the investigation, the Council withdrew its reliance on the exceptions cited previously in relation to some of the withheld information.
17. As no exception is now being applied to this information, the Commissioner must conclude that it was incorrectly withheld. By withholding it, the Commissioner finds that the Council failed to comply with regulation 5(1) of the EIRs. The Commissioner now requires the Council to disclose this information to Mr Boparai.
18. The Commissioner will now go on to consider the remaining information, which the Council still considers to be excepted from disclosure under regulation 10(4)(e) of the EIRs.

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

19. Under regulation 10(4)(e) of the EIRs, a Scottish 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 finds that a document is an internal communication, he will be required to go on to consider the public interest test.
20. The Council applied this exception to all of the withheld information within the reports which was not already in the public domain.
21. The Council stated that the information was created by officers for the sole consideration of its elected members, in order for them to make decisions and recommendations on the next steps for the Clune Park Regeneration Plan.
22. Having considered the information withheld by the Council under this exception, the Commissioner is satisfied that all of this information comprises internal communications and is therefore subject to the exception in regulation 10(4)(e). He must 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

23. The Council submitted that there was a strong public interest in allowing it the opportunity to have a full and frank exchange of views for the purposes of deliberation and the formulation of recommendations.
24. The Council stated that its elected members were required to act in the interests of the citizens of Inverclyde. Consequently, they were entitled to be able to discuss sensitive and important issues in the knowledge that these discussions would not be placed in the public domain, particularly while a sensitive, complex and major litigation matter was ongoing.

25. The Council referred also to the provisions of the Local Government (Scotland) Act 1973 (the 1973 Act) (in particular section 50A) to support its contention that it was permitted to withhold information from the public in such circumstances. (Section 50A of the 1973 Act, read with Schedule 7A, provides that the public can be excluded from meetings of a local authority where certain kinds of “confidential” or “exempt” information would be disclosed if they were present – the Council submitted that a number of these categories applied to the withheld information, including those relating to legally privileged communications and proposed statutory action.)
26. In the Council’s view, it was not in the public interest to disadvantage it in ongoing proceedings, by publishing internal information on its legal position and its internal discussions and communications. It acknowledged a widespread public interest in the affected area and the Council’s plans for it but, on balance, considered the arguments for maintaining the exception to outweigh those for making the information available.
27. Mr Boparai considered it was overwhelmingly in the public interest to let the public know what the Council had done wrong (in relation to the court case it had lost) and why. He referred to the cost of the court case to taxpayers and considered the public had a right to know who was responsible.

The Commissioner’s view

28. The Commissioner has considered all of these submissions carefully, alongside the withheld information (which he has accepted comprises internal discussions for the purposes of this exception).
29. The Commissioner recognises the public interest in accountability and transparency in the decision making processes of public authorities, and in understanding how particular decisions are reached and how particular strategies are developed.
30. The Commissioner also accepts that there can be a public interest in ensuring that officers and elected members of local authorities have a private space in which they can discuss options and issues in detail, without fear that such discussions will be disclosed. The Commissioner accepts that good decision making can rely on the free and frank provision of advice and views, in order that all options can be discussed and the policy making that ensues from such discussions is fully informed. From the submissions put forward, and the information under consideration, he is satisfied that such arguments are of relevance here.
31. The Commissioner also recognises that the matters under consideration in this case concern the appraisal of recent developments and the exploration of potential future options in relation to regeneration plans for the Clune Park estate. The Commissioner notes the Council’s position and acknowledges that disclosure of the information could potentially place the Council at a disadvantage in any future legal proceedings. In the Commissioner’s view, this would not be in the public interest.
32. In the particular circumstances of this case, 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 withholding the information under this exception.
33. As the Commissioner has concluded that all of the remaining withheld information is excepted from disclosure under this exception, he has not gone on to consider the Council’s application of the exception in regulation 10(5)(b) of the EIRs.

Decision

The Commissioner finds that Inverclyde Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Boparai.

The Commissioner finds that the Council correctly handled the request under the EIRs. He also finds that the Council was entitled to withhold information under the exception in regulation 10(4)(e) of the EIRs.

However, the Commissioner finds that the Council breached regulation 5(1) of the EIRs by withholding some information without applying any exceptions. The Commissioner therefore requires the Council to disclose this information to Mr Boparai by **30 November 2017**.

Appeal

Should either Mr Boparai or Inverclyde 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.

Enforcement

If Inverclyde Council (the Council) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

16 October 2017

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;

...

(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;

...

(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.

...

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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