

Decision Notice



Decision 197/2011 Mr Alan Thomson and Perth and Kinross Council

Information relating to the development of a site in Kinross

Reference No: 201101446

Decision Date: 30 September 2011

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr Alan Thomson requested from Perth and Kinross Council (the Council) information relating to the development of the site of the former Kinross High School. The Council refused to disclose the information on the basis that it was excepted from disclosure under regulation 10(5)(e) of the Environmental Information (Scotland) Regulations 2004 (the EIRs). Following a review, Mr Thomson remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had failed to deal with Mr Thomson's request for information in accordance with the EIRs, by wrongly applying the exception in regulation 10(5)(e) of the EIRs to the withheld information. He required the Council to provide the requested information to Mr Thomson.

Relevant statutory provisions and other sources

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a), (b) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make environmental information available on request) and 10(1), (2) and (5)(e) (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 15 June 2011, Mr Thomson emailed the Council explaining that he was aware that the proposed developer of the site of the former Kinross High School had withdrawn their interest. In this respect, Mr Thomson requested from the Council the following information:

"Who the developer was, who was his client and what was the plan i.e. retail, housing, commercial, or whatever? If retail, what size of store(s), if housing, how many and what size etc."



Mr Thomson stressed that he was not interested in receiving any sensitive financial or commercial figures.

2. The Council responded on 5 July 2011. In its response, the Council explained that it considered the information requested by Mr Thomson to be environmental information and so (having applied the exemption in section 39(2) of FOISA) it had considered his request in terms of the EIRs. The Council withheld the information on the grounds that it was excepted from disclosure in terms of regulation 10(5)(e) of the EIRs. This exception applies where disclosure of information would or would be likely to prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
3. Also on 5 July 2011, Mr Thomson emailed the Council requesting a review of its decision. Mr Thomson commented that he did not consider there was any need for confidentiality now that the proposed developer had withdrawn. He maintained that that the information he was seeking could easily be provided without breaching any commercial confidentiality.
4. The Council notified Mr Thomson of the outcome of its review on 27 July 2011, upholding its previous decision without modification.
5. On 2 August 2011, Mr Thomson wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council'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 Thomson 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

7. On 18 August 2011, the Council was notified in writing that an application had been received from Mr Thomson and was asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, 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. In particular, the Council was asked to justify its reliance on any provisions of the EIRs it considered applicable to the information requested.



9. The investigating officer also contacted Mr Thomson during the investigation seeking his submissions on the matters to be considered in the case. Mr Thomson's submissions, along with those of the Council, are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

10. 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 Thomson and the Council and is satisfied that no matter of relevance has been overlooked.

Handling under the EIRs

11. In this case, the Council has considered Mr Thomson's request as one seeking environmental information in terms of the EIRs. Environmental information is defined in regulation 2(1) of the EIRs (the relevant parts of the definition are reproduced in the Appendix to this decision). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various restrictions and exceptions contained in the EIRs
12. Having had regard to the subject matter of Mr Thomson's request (information concerning the proposal to develop a site for alternative use) and the withheld information, the Commissioner agrees with the Council that the information sought in this request is environmental information for the purposes of the EIRs. The information relates to proposed building and development work at the specified site ultimately involving measures (such as planning proposals) and activities (the operations on the site) affecting or likely to affect the elements referred to in part (a) of the definition (in particular air and atmosphere, land, landscape and natural sites) or factors (such as noise or waste) referred to in part (b) of the definition. As such, the Commissioner is satisfied that the information withheld by the Council is environmental information as defined in part (c) of the definition, and the Council acted correctly by considering Mr Thomson's request for this information as one made in terms of the EIRs.
13. The exemption in section 39(2) of FOISA provides that environmental information, as defined by regulation 2(1) of the EIRs, is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, having concluded that the information requested by Mr Thomson is environmental information, the Commissioner accepts that the Council was entitled apply this exemption in its response to Mr Thomson's request for information.
14. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also 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. The Commissioner has therefore proceeded to consider this case in what follows solely in terms of the EIRs.



Regulation 10(5)(e)

15. Regulation 10(5)(e) of the EIRs 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 commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
16. In this case, the Council applied the exception in regulation 10(5)(e) to all of the withheld information.
17. The Aarhus Convention: an Implementation Guide¹ (which offers guidance on the interpretation of the Aarhus Convention) notes (at page 60) that the first test for considering this exception states that national law must expressly protect the confidentiality of the withheld information: it must, the guidance states, explicitly protect the type of information in question as commercial or industrial secrets. Secondly, the confidentiality must protect a "legitimate economic interest": this term is not defined in the Convention, but its meaning is considered further below.
18. The Commissioner has taken this guidance into consideration when considering this exception. His view is that before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
 - Is the information commercial or industrial in nature?
 - Does a legally binding duty of confidence exist in relation to the information?
 - Is the information publicly available?
 - Would disclosure of the information cause, or be likely to cause substantial harm to a legitimate economic interest?

Is the information commercial or industrial in nature?

19. The information withheld under this exception is the name of the preferred bidder for the sale of the former Kinross High School site, and the nature and size of the development that bidder had proposed.
20. The Council argued that the sale of the site was being undertaken in order to obtain the most economically advantageous outcome for the Council and the preferred bidder's intention was to use the site on a commercial basis. As such, the Council considered the identity of the bidder and details of their intended use of the site to be commercial in nature.
21. The Commissioner is satisfied that the information in question relates to the preferred bidder's proposals for the development of the site. As such, he is satisfied that the information is commercial in nature.

¹ <http://www.unece.org/env/pp/acig.pdf>



Does a legally binding duty of confidence exist in relation to the information?

22. In its submissions, the Council explained that it is its normal practice to treat information about any property transaction as confidential prior to the completion of a contract. The Council submitted that this reflects normal commercial practice and is the conduct expected of all participants in property transactions.
23. In this case, the Commissioner is satisfied that the information under consideration has been received by the Council under an implied obligation to maintain confidentiality. The Commissioner considers such an expectation to be normal practice in circumstances of this kind.

Is the information publicly available?

24. In his submissions to the Commissioner, Mr Thomson supplied a copy of a newspaper article (dated 5 July 2011, the same day that the Council refused his request) which reported that the proposed developer of the site in question had withdrawn its interest. The article purported to name the proposed developer, and in so doing provided some indication of the nature of the proposed development. The article included a quote from a Perth and Kinross Councillor which also appeared to unequivocally name the proposed developer.
25. In its submissions, the Council stated that the information sought by Mr Thomson had not been placed in the public domain by either the Council or the developer. The Council noted that a newspaper had reported a Councillor naming the developer, but, contrary to the impression given in the article, the Council had neither confirmed nor denied the identity of the developer. The Council referred to its official statement to the newspaper and noted that the statement had made no mention of the developer's identity.
26. When issuing his decision, the Commissioner must take care not to disclose or indicate the nature of the withheld information under consideration. For this reason, the Commissioner can not confirm in this decision whether or not the identity of the developer and the nature of the proposed development were correctly reported in the newspaper article forwarded by Mr Thomson.
27. In this case, the Commissioner recognises that information has been published, and attributed to an individual with close connections to the Council, apparently identifying the Council's preferred bidder and the nature of the proposed development. However, the Commissioner accepts that this information has been neither confirmed nor placed in the public domain by the Council itself (which is a distinct legal body from its Councillors) or the developer.
28. Whilst the Commissioner finds the circumstances surrounding the article somewhat unusual, he accepts that the Council has not placed any information regarding the identity of the developer in the public domain. He recognises that, since the Council itself has neither confirmed nor denied publicly that the information contained in the newspaper article is accurate, disclosure of the withheld information would either establish the veracity of the reported information, or correct it.



29. In the absence of public confirmation of the facts by either of the parties, the Commissioner is satisfied that the withheld information cannot be said to be definitively in the public domain.

Would disclosure of the information cause, or be likely to cause substantial harm to a legitimate economic interest?

30. As noted above, the term “legitimate economic interest” is not defined within the EIRs. The interest in question will however be financial, commercial or otherwise “economic” in nature, and the prejudice to that interest must be substantial. In order to apply this exception, an authority must, in the Commissioner’s view, be able to demonstrate that the harm to the economic interest in question would be real, actual and of significant substance.
31. In its submissions, the Council has argued that disclosure of the information would cause substantial harm to both the developer and the Council.
32. The Council submitted that the developer has a number of close competitors and that disclosure of its intentions to either develop, or withdraw interest from, a site prior to a contract being concluded would give a significant advantage to its competitors and would disadvantage the developer significantly in terms of its overall strategy. The Council also noted that the developer was still at liberty to submit another bid in any future marketing of the site by the Council.
33. In relation to its own economic interests, the Council stated that it operates routinely in the non-domestic property market as part of its functions and this requires it to be respected and considered trustworthy by other participants in the market place. The Council argued that premature disclosure of the identity of the developer or any details of a bid would breach that trust and would significantly hamper the Council’s future property dealings.
34. In his submissions, Mr Thomson argued that disclosure of the information would benefit the Council’s position as it would attract other expressions of interest and would possibly create an auction for the site which would be in the interests of the Council and council tax payers.
35. For the exception in regulation 10(5)(e) to apply, it must be established that disclosure would prejudice substantially, or would be likely to prejudice substantially, the economic interests in question. In order to apply this exception, an authority must therefore be able to demonstrate that the harm to the economic interest in question would be real, actual and of significant substance.
36. The Commissioner has considered the arguments put forward by the Council, but is not persuaded that the effect of disclosure would be likely to have any of the consequences suggested by the Council, or that it would, or would be likely to, prejudice substantially the economic interests of the Council or the developer.



37. In reaching this view, the Commissioner notes that Mr Thomson has not sought any financial information regarding the bid and the withheld information does not reveal anything beyond the name of the developer and the general nature of the proposed development. The Commissioner has seen no evidence to suggest that such a disclosure could lead to such a negative impact on the Council's ability to conduct future property transactions, nor that the developer would be placed at a disadvantage to its competitors, given that the information under consideration would offer little insight to the developer's competitors.
38. In the absence of any submissions or evidence from the Council that have persuaded him of how or why disclosure of the information under consideration would, or would be likely to, harm the Council's or the developer's economic interests, the Commissioner is not persuaded that disclosure would do so.
39. Consequently, the Commissioner has concluded that the Council was wrong to apply the exception at regulation 10(5)(e) to the withheld information and, as such, he has not gone on to consider the public interest test required by regulation 10(1) of the EIRs in relation to that exception.
40. As the Commissioner has found that the exception was incorrectly applied by the Council, he now requires the Council to disclose the requested information to Mr Thomson.

DECISION

The Commissioner finds that Perth and Kinross Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Thomson. The Commissioner finds that by incorrectly applying the exception in regulation 10(5)(e) to Mr Thomson's information request, the Council failed to comply with regulation 5(1).

The Commissioner therefore requires the Council to provide Mr Thomson with the requested information by 15 November 2011.



Appeal

Should either Mr Thomson or the Council 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.

Margaret Keyse
Head of Enforcement
30 September 2011



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 –

- (a) the provision does not confer absolute exemption; and
- (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.

...



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-

...

- (e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;

...