

Decision Notice



Decision 200/2012 Clatto Landscape Protection Group and Fife Council

Wind turbine planning reports

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Summary

Clatto Landscape Protection Group (CLPG) requested from Fife Council (the Council) information relating to two wind turbine planning applications. The Council released some information but withheld the preliminary case officer's reports under regulation 10(4)(e) (internal communications) of the EIRs. Following an investigation, the Commissioner accepted that the information related to internal communications, but found that the public interest favoured disclosure.

Relevant statutory provisions

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

Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a) and (c) 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 the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 17 May 2012, CLPG wrote to the Council requesting information relating to two specific wind turbine planning applications. The request was for relevant communications and meeting minutes, along with copies of the case officer's preliminary assessment reports recommending refusal of both applications.
2. The Council responded on 6 July 2012, providing certain information, advising that other information was not held and withholding the case officer's reports under regulation 10(4)(e) of the EIRs on the grounds that these reports constituted internal communications. On the basis that the information requested was environmental, the Council applied the exemption in section 39(2) of FOISA.



3. On 7 July 2012, CLPG wrote to the Council requesting a review of its decision. In particular, CLPG did not believe that the case officer's reports fell within the definition of "internal communications" and was of the view that minutes recording discussions on subsequent changes to the reports should be held.
4. The Council notified CLPG of the outcome of its review on 3 August 2012. The Council stated that it had investigated further and confirmed that it did not hold any internal communications or meeting minutes on subsequent changes to the reports. The Council also upheld the application of regulation 10(4)(e) of the EIRs in respect of the case officer's reports, with reasons.
5. On 24 August 2012, CLPG wrote to the Commissioner, stating that it was still dissatisfied with the Council's refusal to disclose the case officer's reports 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 CLPG 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 29 August 2012, the Council was notified in writing that an application had been received from CLPG and was asked to provide the Commissioner with any information withheld from it. 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 regulation 10(4)(e) of the EIRs.
9. The relevant submissions received from both the Council and CLPG will be considered fully in the Commissioner's analysis and findings 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 her by both CLPG and the Council and is satisfied that no matter of relevance has been overlooked.



Handling in terms of the EIRs

11. The Council dealt with CLPG's request under the EIRs, having concluded that CPLG was seeking environmental information, as defined in regulation 2(1) of the EIRs (the relevant parts of the definition are reproduced in the Appendix to this decision).
12. Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
13. As the information requested by CPLG concerns the potential construction of wind turbines, it concerns the state of the elements of the environment, such as air, soil, land and landscape, and the interaction among these elements. It also concerns measures, such as plans, programmes and activities, likely to affect those elements of the environment. In the circumstances, therefore, the Commissioner is satisfied that the information requested by CPLG falls within the definition of environmental information set out in regulation 2(1), in particular paragraphs (a) and (c) of that definition.
14. The Commissioner therefore concludes that the Council was correct to consider CLPG's information request under the EIRs.

Section 39(2) of FOISA – environmental information

15. The exemption in section 39(2) of FOISA provides, in effect, that environmental information as defined by regulation 2(1) of the EIRs is exempt from disclosure under FOISA, with a view to any such information being considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Council was correct to apply the exemption to the withheld information, given her conclusion that it is environmental information as defined by regulation 2(1).
16. 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 CLPG in this case, the Commissioner accepts that the public interest in maintaining this exemption and 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 consequently proceeded to consider this case in what follows solely in terms of the EIRs.

Regulation 10(4)(e) of the EIRs

17. The Council withheld the information under regulation 10(4)(e) of the EIRs.
18. Under regulation 10(4)(e), a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications.



19. As with all the exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). Even where the exception applies, the information must be released unless, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
20. For information to fall within the scope of the exception in regulation 10(4)(e), it need only be established that the information is an internal communication.
21. The withheld information in this case comprises a planning case officer's preliminary assessment reports, recommending refusal of planning permission for the wind turbine developments.
22. The Council submitted that the case officer reports in question were earlier versions of committee reports, intended only for in-house comment and discussion at that stage prior to final assessments being completed and the overall service view being agreed and finalised thereafter. It was pointed out by the Council that the reports were clearly and individually marked as "Works in Progress" and that they were for discussion purposes only with the Head of Service, legal officers, the Chair of the Committee and other officers of the Council.
23. The Council went on to explain that the only input from the Chair of the Committee would be whether he was happy to have the item on the list for consideration and its placing on the agenda: he would make no comment on the recommendation at this stage in the process. Such reports were only made public, the Council submitted, once the content and recommendation had been agreed by Head of Service/Senior Management and the content of the report finalised.
24. In this case, the Commissioner is satisfied that the withheld information constitutes internal communications for the purposes of the EIRs. She accepts that the reports in question were prepared for internal discussion among Council staff and were not intended for presentation to Committee. She therefore concludes that the exception in regulation 10(4)(e) of the EIRs was correctly applied to this information.
25. The application of the exception is subject to the public interest test in regulation 10(1)(b), however, so the Commissioner must now go on to consider this.

The public interest test

26. As noted above, the public interest test in regulation 10(1)(b) specifies that a Scottish public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.



The Council's submissions

27. The Council asserted that, for the Committee process to function effectively, it was essential that relevant officers of the Council were free to prepare draft committee reports for consideration at the pre-agenda stage of the committee process. The Council submitted that the detail within a report (including any recommendation) might change substantially as the Committee process developed and before the final version of any report was made available to the public. The Council stated that such draft reports were prepared on the basis that they were only for internal discussion and “safe in the knowledge that changes may be made prior to publication of the final report”. In addition, the Council reiterated that the reports in question were clearly marked as “Work in Progress” and officers were firmly of the view that they were not intended for wider publication.
28. It was the view of the Council that, if preliminary versions of reports were made publicly available, then its officers would be less likely to include detail and recommendations in the reports at that stage, and this might make it necessary to consider whether to advise staff formally that a change in process might be required (either by the destruction of draft reports following the pre-agenda committee or by changing the content of the “Work in Progress” reports). This, the Council submitted, would seriously impact on its decision making and committee processes.
29. The Council accepted that the withheld reports may be of interest to particular members of the public, but asserted that this was outweighed by the public interest arising from it being able to freely discuss draft reports in confidence and ensure that the Committee process worked effectively.

CLPG's submissions

30. By way of background, CLPG explained its understanding that two reports (the preliminary reports) were advanced for consideration for the agendas of two area committees and the Planning Committee, but never reached those committees in their original form. The preliminary reports recommended refusing permission, but the final versions presented recommended granting permission, albeit that planning permission was in fact refused by the Committees. CLPG stated that the applicants had appealed the refusal and the appeals were under consideration in the Directorate for Planning and Environmental Appeals (the DPEA).
31. CLPG argued that disclosure of the preliminary reports would assist third party objectors to argue their case against the applicants' appeals to the DPEA effectively. CLPG also provided the Commissioner with two email communications between the case officer and the two planning applicants, which they believed confirmed that the existence of the two preliminary reports was information already in the public domain.
32. With regard to the appeal process, CLPG submitted that it was of relevance to allow a juxtaposition of the reports recommending refusal with the reports recommending approval, to identify in detail how the Council had handled the two applications and what factors led to a change in recommendation.



33. Now that the matter was under appeal, CLPG submitted, it was essential that participants in the determination process could have access to the thinking of the Council as it developed. The Council argued that, in order for third party objectors to be able to examine the Council's witnesses (including the case officer) properly at the planning inquiry, they must be able to see the earlier reports to understand the justification for a change in recommendation.
34. In addition, CLPG stated that it was making a complaint to the Scottish Public Services Ombudsman (the SPSO) about the Council's handling of these planning applications, and was in the process of preparing its submission. CLPG believed it was in the public interest to have the two reports disclosed because it would shed light on how the Council's planning service approached some key issues concerning the assessment of planning applications for wind turbines.

The Commissioner's conclusions

35. The Commissioner has considered the submissions made by the Council and recognises the importance of freedom and frankness on both sides if preliminary discourse is to be effective. She accepts that there may be information created in the course of such preliminary deliberation which is of such commercial or other sensitivity as to justify a stronger public interest against disclosure, and that the reasonable expectations of both the applicant and the planning officers may be relevant in this context. Such arguments must, however, be focused on the circumstances of each individual case, considering the content of the actual information withheld.
36. In this case, the Commissioner finds the arguments presented by the Council to be generic in nature, with little or no direct reference to the subject matter of the withheld information and no reasons why the public interest should weigh more heavily in favour of withholding this *particular* information.
37. CLPG, on the other hand, has put forward cogent (if not necessarily compelling) arguments as to why it would be in the public interest to disclose this information, in the context of both the ongoing planning appeals and its complaint to the SPSO.
38. The Commissioner accepts that disclosure of the preliminary reports would give a measure of coherence to understanding the whole process of how the applications were considered, and how the recommendation to Committee members was finally arrived at. In addition, the Commissioner acknowledges that planning matters should generally be subject to maximum transparency, as has been underlined by the Scottish Government in its current planning reforms.¹ This is particularly so given the substantial public interest in matters of environmental and landscape protection.

¹ <http://www.scotland.gov.uk/Resource/0039/00390626.pdf>



39. The Commissioner also acknowledges that the existence of the preliminary reports is already in the public domain, although their content is not. While the DPEA may now have reached a decision on the planning appeals², the Commissioner must consider the position at the time the Council dealt with CLPG's request (specifically, when it dealt with CPLG's request for review).
40. On balance, having carefully considered the submissions made by both parties and the content of the withheld information, the Commissioner is satisfied (in all the circumstances) that the public interest in making this information available is not outweighed by that in maintaining the exception in regulation 10(4)(e). She therefore requires the Council to disclose the information to CLPG.

DECISION

The Commissioner finds that Fife Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Clatto Landscape Protection Group (CLPG).

The Commissioner finds that the Council was not entitled to withhold the information on the basis that it was excepted from disclosure under regulation 10(4)(e) of the EIRs. By failing to provide CLPG with the requested information, the Council failed to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires the Council to disclose the withheld information by 21 January 2013.

Appeal

Should either Clatto Landscape Protection Group or Fife 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
4 December 2012

² <http://www.dpea.scotland.gov.uk/CaseDetails.aspx?id=qA308061>



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.

...



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;

...

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.