

Decision Notice



Decision 119/2008 Mr James Paul Kelly and Dundee City Council

Quote for gull egg removal service

Reference No: 200701779

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www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

Mr James Paul Kelly (Mr Kelly) requested from Dundee City Council (the Council) details of the quote it provided to Hillcrest Housing Association (Hillcrest) for the removal of gull eggs from two flat-roofed properties in Dundee. The Council responded by withholding the information in terms of section 33(1)(b) of FOISA. Following a review, Mr Kelly remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner took the view that the information identified was environmental information, and asked for the Council's comments. The Council did not agree that the information was environmental, but it indicated that, should the Commissioner continue to consider the case under the EIRs, it would wish to rely upon the exception under regulation 10(5)(e) of the EIRs in withholding the information.

The Commissioner considered this case under both FOISA and the EIRs. He found that the Council had failed to deal with the request in line with the EIRs, and that it had also failed to comply with Part 1 of FOISA. He required the Council to disclose the withheld information to Mr Kelly.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 2(1) (Effect of exemptions); 33(1)(b) (Commercial interests); and 39(2) (Health, safety and the environment).

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulation 2(1) (Interpretation) (definition of "environmental information"); 5(1) (Duty to make available environmental information on request); 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.

Decision 218/2007 Professor A D Hawkins and Transport Scotland (the Hawkins Decision).
<http://www.itspubliknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>

The Aarhus Convention: an implementation guide (the Aarhus Convention Implementation Guide):
<http://www.unece.org/env/pp/acig.pdf>

Access to Environmental Information: Guidance for Scottish Public Authorities and Interested Parties on the Environmental Information (Scotland) Regulations 2004:
<http://www.scottishexecutive.gov.uk/Resource/Doc/26800/0014460.pdf>.



Background

1. On 20 August 2007, Mr Kelly wrote to the Council asking it to respond to a number of questions relating to the Council's provision of a quote for the removal of gull eggs from the flat roofs of two properties in Dundee owned by Hillcrest. This letter included an information request for details of the quote provided by the Council to Hillcrest for the removal of gull eggs, which is the subject of this decision.
2. The Council responded to Mr Kelly's information request on 5 October 2007. It advised Mr Kelly that it was withholding details of the quote in terms of section 33(1)(b) of FOISA, as its disclosure would or would be likely to substantially prejudice the Council's commercial interests.
3. On 8 November 2007, Mr Kelly wrote to the Council requesting a review of this decision. Mr Kelly did not accept that disclosure of this information would harm the Council's commercial interests, and he pointed out that another company that had bid to provide the service had disclosed the value of its quote.
4. The Council wrote to notify Mr Kelly of the outcome of its review on 4 December 2007. The Council upheld its original decision not to disclose details of the quote and provided additional comments on its consideration of the public interest.
5. On 13 December 2007, Mr Kelly wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying for a decision in terms of section 47(1) of FOISA (which also deals with applications under the EIRs).
6. The application was validated by establishing that Mr Kelly 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 17 December 2007, the Council was notified in writing that an application had been received from Mr Kelly and was asked to provide the Commissioner with specified items of information required for the purposes of the investigation. 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, asking it to provide comments on the matters raised by the applicant and the application as a whole. The Council was also asked to respond to specific questions on the application.



9. This investigating officer notified the Council that, having considered the information withheld in this case, the Commissioner was of the view that it consisted of environmental information. The Council was asked to comment on this matter and provide submissions on whether it would consider the information withheld in this case to fall under the scope of any of the exceptions contained in the EIRs. The Council was also asked if it wished to apply section 39(2) of FOISA to any information that the Commissioner considered to be environmental.
10. The Council's responses indicated that it did not accept that the information withheld in this case was environmental information. However, it confirmed that if the Commissioner were to judge the information withheld to be environmental information and consider this case under the EIRs, then it would apply the exception in regulation 10(5)(e) of the EIRs.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the submissions that have been presented to him by both Mr Kelly and the Council and he is satisfied that no matter of relevance has been overlooked.

Mr Kelly's information request

12. Mr Kelly is seeking details of the monetary quote submitted by Dundee City Council to Hillcrest for the removal of herring gull eggs from the flat roofs of two properties (owned by Hillcrest) in Dundee city centre.

EIRs or FOISA?

13. Environmental information is defined in regulation 2 of the EIRs (the definition is reproduced in full 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.
14. The Commissioner will not repeat his full discussion of the relationship between FOISA and EIRs in this decision. He would note, however, that the reasoning set out in *Decision 218/2007 Professor A D Hawkins and Transport Scotland* is assumed also to apply here. Broadly, the Commissioner's general position on the interaction between the two regimes is as follows:
 - The definition of what constitutes environmental information should not be viewed narrowly.
 - There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
 - Any request for environmental information therefore **must** be dealt with under the EIRs.



- In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
 - If the authority does not choose to claim the section 39(2) exemption, it must deal with the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these).
 - The Commissioner is entitled (and indeed obliged), where he considers a request for environmental information has not been dealt with under the EIRs, to consider how it should have been dealt with under that regime.
15. The implication of the Hawkins Decision for the Commissioner's consideration of Mr Kelly's request is therefore that the Commissioner must first determine whether the information withheld is environmental information. If it is, he must go on to consider the Council's handling of the request both in terms of the EIRs and FOISA.
16. Having reviewed the information withheld in this case, the Commissioner reached the initial view that it was environmental information. The investigating officer relayed this view to the Council in a letter dated 25 January 2008, which invited comments on this point, and also asked the Council to confirm whether it would consider the information withheld to fall under the scope of any of the exceptions from disclosure contained within the EIRs. The Council was also asked whether it would wish to apply the exemption in section 39(2) of FOISA to the quote, if the Commissioner judged this to be environmental information.
17. In the correspondence that followed, the Council submitted that it did not agree with the Commissioner's view that the requested information was environmental, but should the Commissioner proceed to determine this case in terms of the EIRs, it would consider the quote to be excepted from disclosure under regulation 10(5)(e) of the EIRs.
18. With respect to section 39(2) of FOISA, the Council initially stated that it would apply this exemption *if the Commissioner was correct* in his opinion that the information withheld in this case is environmental. When asked to clarify this submission, the Council confirmed that it did not wish to concede that the information withheld was environmental information and it reserved the right to challenge any decision made in terms of the EIRs on the basis that the provisions of FOISA should have been applied to the request. In the circumstances – and having recognised that it would a matter be for the Court of Session to determine whether the Commissioner had acted correctly should the Council decide to appeal the Commissioner's decision - the Commissioner has proceeded on the basis that the Council did not wish to apply the exemption in section 39(2) of FOISA to this information at this stage.

Does the quote constitute environmental information?

19. In this case, the withheld information consists of a quote for a pest control programme in Dundee. It is the Commissioner's view that although the requested information consists only of a monetary figure, when considered in the context of the remainder of the document, it is clearly environmental information.



20. He is of this opinion as the quote is an integral part of the information concerning the measures to be taken to protect built structures and human health from the effects of gulls. Additionally, it also represents an integral part of the information on measures or activities which affect biological diversity, given the impact on the gull population. Consequently, it is the Commissioner's view that the information sought by Mr Kelly constitutes environmental information as defined in part (c) of regulation 2(1) of the EIRs.
21. Having drawn this conclusion, the Commissioner would also conclude that the exemption in section 39(2) of FOISA *could* have been applied to this information. If this exemption had been applied by the Council, this conclusion would have prompted the Commissioner to consider whether the information had been properly withheld only in terms of the EIRs.
22. However, as noted above, there is no obligation to rely upon any exemption in FOISA, and Council has indicated that it would not necessarily accept in this case that a decision under the EIRs was correct in law. In the circumstances, the Commissioner has found it appropriate consider the Council's handling of Mr Kelly's request and to set out his conclusions under the terms of both FOISA and the EIRs.

Consideration of the information withheld under the EIRs

23. When asked for its comments on the case under the terms of the EIRs, the Council confirmed that, should the Commissioner disagree with its view and find the information under consideration to be environmental information, it would consider that the quote was excepted from disclosure under regulation 10(5)(e) of the EIRs.
24. Regulation 10(5)(e) 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.
25. As with all of the exceptions contained within regulation 10, a Scottish public authority applying this exception must interpret the exception 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, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
26. The Aarhus Convention Implementation Guide (which offers guidance on the interpretation of the Aarhus Convention) notes that the first test for considering this exception states that national law must expressly protect the confidentiality of the withheld information. In practical terms, this means that national law must explicitly protect the type of information in question as commercial or industrial secrets.
27. The same guidance goes on to note that the Aarhus Convention does not define "legitimate economic interest" but that there are several steps that countries have taken to help define legitimate economic interest case by case. These are:



- Establish a process. Parties [to the Convention, i.e. relevant states] may wish to establish some type of process or test to identify information that has a legitimate economic interest in being kept confidential;
- Determine confidentiality. Legitimate economic interest carries the implication that the information is only known to the company and the public authority, or at least is certainly not already in the public domain; and that the body whose interests are at stake took reasonable measures to protect the information. This can be objectively determined in each case;
- Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors.

28. The Commissioner has taken this guidance into consideration when considering this exception.

29. The Council has submitted that since the information requested is a monetary quote for services, the Council has a legitimate economic interest in keeping that information confidential. In its submissions, the Council referred to the Scottish Executive Environment Group's Guidance on the Implementation of the Environmental Information (Scotland) Regulations 2004 (November 2004) which state that:

“Confidentiality of commercial or industrial information must safeguard a legitimate economic interest... A legitimate economic interest could...cover...details of prices... It may also cover information that could give an insight into a Company's general method of business or approach to certain types of contracts.

The Courts have held that “legitimate economic interest” also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors”.

30. The Council has argued that the above applies equally where the organisation pricing a contract is not a Company but a Council. The Council also referred the Commissioner to its response to Mr Kelly's request for review [dated 4 December 2007] in which its Chief Executive set out the Council's reasons for arguing that it would suffer substantial prejudice if the requested information was disclosed. In this letter, the Council argued that there is a real or very likely chance of its ability to provide bird control services being adversely affected by disclosure of the quote, and as the Council generates income from the provision of bird control services each year, the harm likely to be caused is significant and the harm is likely to occur in the near future. The Council has also argued that it has a legitimate economic interest in keeping the withheld information confidential and that such confidentiality is provided for by law.

31. In reaching his conclusions on this exception, the Commissioner first considered whether the information withheld was properly held to be “commercial” or “industrial”, and he accepts that it is. The quote relates to the service offered by the Council on a commercial basis in a competitive environment, and as such can be considered to be commercial information.



32. Turning next to the question of whether the information in question is confidential and such confidentiality is provided for in law, the Commissioner has noted in this case that the quote requested by Mr Kelly was contained in a letter from the Council to Hillcrest. It is clear from this letter that the Council was responding to a request for a quote from Hillcrest and, in addition to the quote, the letter includes a brief overview of the issues affecting the specific properties and the potential solutions to the gull problem affecting these. The Commissioner notes that the Council has already disclosed to Mr Kelly a copy of this letter, with only the monetary quote itself redacted.
33. The Commissioner has reviewed this letter and he cannot see any indication, in any of its content, which would indicate that the Council expected the details contained within the letter (including the quote) to remain confidential. This information was voluntarily provided to a third party (Hillcrest) by the Council, apparently without any express statement suggesting that it should not be shared with other interested parties. The Council has not provided the Commissioner with any evidence supporting its argument that this information should be judged confidential and that such confidentiality is provided for in law. In light of this, and his obligation to interpret the exception in regulation 10(5)(e) of the EIRs restrictively, the Commissioner cannot see how the Council can consider the quote to be subject to the protection of confidentiality.
34. Turning to the question of harm, the Commissioner was directed by the Council to the arguments put forward in the letter that notified Mr Kelly of the outcome of its review. In this letter, the Council submitted that since it provides bird control services in a competitive environment, it was entitled to rely on the exemption contained in section 33(1)(b) of FOISA (which applies where disclosure would or would be likely to prejudice substantially the commercial interests of any person) as disclosure of the requested information would adversely affect its ability to provide bird control services. The Council further argued that the likelihood of its ability to provide bird control services being adversely affected by disclosure of the requested information was real or very likely, and as the Council generates income from the provision of bird control services each year, the harm likely to be caused is significant and the harm is likely to occur in the near future.
35. The Commissioner has considered these arguments in relation to regulation 10(5)(e) in order to determine whether the test concerning "legitimate economic interests" has been met in this case. As noted above, the guidance on this exception suggests that this test is only met if it is established that disclosure would significantly damage the interest in question and assist the relevant person's competitors.
36. The Commissioner has considered these arguments carefully. It is the Commissioner's view that while, in some cases, the disclosure of the mechanism of how an organisation (in this case the Council) calculates a quote for services could cause harm to the commercial interests or the legitimate economic interests of that organisation - by providing its competitors with an insight into how it is likely to quote for future business - disclosure of the quote itself would offer little competitive advantage.



37. The Commissioner acknowledges that the Council generates income from its bird control service, but he fails to see how the disclosure of this quote, which relates to gull egg removal from two specific buildings, will prevent the Council from continuing to generate income from these services in the future. It is the Commissioner's view that bird control issues will vary from client to client, and that a quote for the removal of gull eggs from one building may differ from that provided to another client for a larger or smaller building or one which is more or less accessible and with a lesser or greater pest problem.
38. In addition, the quote provided by the Council only comprises the finalised monetary figure; it does not contain any information on how the quote was calculated, or any details of the Council's costs, and profit margins, or the basis upon which the quoted sum was determined. The Commissioner is unable to accept that the disclosure of this quote would or would be likely significantly damage the legitimate economic interests of the Council.
39. Having considered two of the tests required by the exception in regulation 10(5)(e) of the EIRs, the Commissioner has found that neither of these has been met in this case. He is not persuaded that the confidentiality of the information withheld by the Council is provided for by law. He is also not persuaded that (even if such protection were provided by law) disclosure would or would be likely to significantly harm the legitimate economic interests of the Council. In these circumstances, the Commissioner does not accept that the exception in regulation 10(5)(e) of the EIRs applies to this information.
40. As the Commissioner has not upheld the Council's application of regulation 10(5)(e) he is not required to consider the public interest. The Commissioner requires the Council to provide Mr Kelly with details of the quote he has requested.

Consideration of the information withheld under FOISA

41. As noted above, the Commissioner has concluded that the information under consideration in this case is environmental information, and that Mr Kelly was entitled to receive this under the terms of the EIRs. Nothing in FOISA can take away the rights under the EIRs and so the Commissioner's conclusions set out above would remain, even if he were to find that the information under consideration was exempt from disclosure under FOISA. In future, the Commissioner will not always go on to consider a case under the terms of both FOISA and the EIRs if he finds that one set of legislation requires disclosure.
42. Nonetheless, the Commissioner is aware in this case that the Council disagreed with his view that the information under consideration is environmental information and so he has set out his consideration of the case under FOISA to demonstrate the outcome under that law as well as the EIRs.

Application of section 33(1)(b)

43. Section 33(1)(b) of FOISA states that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).



44. There are certain elements to section 33(1)(b) of FOISA which an authority needs to demonstrate when relying on this exemption. In particular, it needs to indicate whose commercial interests might be harmed by disclosure, what the nature of those commercial interests are and how these interests would be prejudiced substantially by disclosure. Where an authority is arguing that the commercial interests of a third party will be harmed, the authority must make this clear and must indicate the nature of those commercial interests and how these interests would, or would be likely to, be substantially prejudiced.
45. Even where an authority considers that section 33(1)(b) of FOISA applies to information which is the subject of the request, it must still go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.
46. As noted above, when explaining its reasons for withholding the quote, the Council directed the Commissioner to the reasoning set out in the letter of 4 December 2007 in which it notified Mr Kelly of the outcome of its review. The Council argued that since it provides bird control services in a competitive environment, it is entitled to rely on the exemption contained in section 33(1)(b) of FOISA as disclosure of the requested information would adversely affect its ability to provide bird control services. The Council further argued that the likelihood of its ability to provide bird control services being adversely affected by disclosure of the requested information is real or very likely, and as the Council generates income from the provision of bird control services each year, the harm likely to be caused is significant and the harm is likely to occur in the near future.
47. In previous decisions, the Commissioner has accepted that public authorities can have commercial interests, but only in specific instances where he is satisfied that a particular commercial activity is being carried out. In this case, the Commissioner has considered the arguments put forward by the Council and he accepts that the Council does hold commercial interests in relation to its provision of bird control services.
48. Having considered whether the test of substantial prejudice to those commercial interests is met in this case, the Commissioner has concluded that it is not. This is for the same reasons as those set out under paragraphs 34-36 in his consideration of whether regulation 10(5)(e) of the EIRs is met. The Commissioner does not see how disclosure of this quote would or would be likely to cause the level of harm required by the exemption contained in section 33(1)(b).
49. Therefore, having considered this case also in terms of FOISA, the Commissioner has found that although the Council has claimed that disclosure of the information withheld would substantially prejudice its commercial interests, it has not provided him with any evidence that persuades him that such damage would or would be likely to occur. The Commissioner therefore finds that the Council was wrong to withhold the quote from Mr Kelly under section 33(1)(b) of FOISA.
50. As the Commissioner has found that the exemption in section 33(1)(b) has been incorrectly applied, he is not required to consider the public interest as it relates to this exemption.



DECISION

In this decision, the Commissioner has considered a request for information that he has judged to be environmental information as defined within regulation 2 of the Environmental Information Scotland Regulations 2004 (EIRs). As set out above, authorities are obliged to consider such requests in accordance with the requirements of both the EIRs and the Freedom of Information (Scotland) Act 2002 (FOISA). The Commissioner's decision therefore has considered whether Dundee Council (the Council) acted in accordance with each of these laws.

The Commissioner finds that Dundee City Council failed to comply with both Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Kelly. By failing to provide Mr Kelly with the details of the monetary quote that he requested, Dundee City Council failed to comply with regulation 5(1) of the EIRs and section 1(1) of FOISA.

The Commissioner therefore requires Dundee City Council to provide Mr Kelly with a copy of the quote he requested by 2 November 2008.

Appeal

Should either Mr Kelly or Dundee City 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.

Kevin Dunion
Scottish Information Commissioner
18 September 2008



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.

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.

33 Commercial interests and the economy

- (1) Information is exempt information if-
...
 - (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

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;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (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.

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;