

Decision Notice



Decision 195/2011 Mrs Mary Ogg and Fife Council

Responsibility for maintenance a particular pathway

Reference No: 201100485

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Scottish Information Commissioner

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Summary

Mrs Mary Ogg requested from Fife Council (the Council) information relating to the adoption and maintenance of a particular pathway. The Council advised that the pathway had not been adopted and it had not undertaken any maintenance. Mrs Ogg requested a review on the basis that it did not consider the information provided to be accurate. Following a review, the Council reiterated that the pathway was not adopted, and withheld legal advice on this matter under exceptions from disclosure within the Environmental Information (Regulations) Scotland 2004 (EIRs). Mrs Ogg remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mrs Ogg's request for information in accordance with the EIRs. He concluded that it was entitled to withhold the legal advice under regulation 10(4)(e) of the EIRs. He did not require the Council to take any action.

Relevant statutory provisions and other sources

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation – parts (a), (b) and (c) of the definition of environmental information); 5(1) and (2)(b) (Duty to make environmental information available on request) and 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 7 October 2010, solicitors acting on behalf of Mrs Mary Ogg wrote to the Council requesting a range of information regarding the adoption and maintenance of a particular footway. In particular Mrs Ogg's solicitors requested confirmation as to whether this particular pathway had been adopted by the Council, and information about inspections of this area.
2. Subsequent references to correspondence from and to Mrs Ogg should be read as including correspondence sent from and to her solicitors on her behalf.



3. The Council responded on 8 November 2010. It stated that the footway had not been adopted for maintenance by the Council's Transportation Services but was the responsibility of Fife Council Housing Service. It explained that there was no formal inspection regime, though if a complaint was received the matter would be inspected and repairs arranged.
4. On 1 February 2011, the Council wrote again to Mrs Ogg, noting that there had been an error in the information previously sent. The Council now indicated that Fife Council Housing Service did not have any properties in the area, and so the footpath in question was not the responsibility of that Service. The Council indicated again that the footpath is not adopted by Fife Council's Transportation Service, but suggested that it was possibly the responsibility of Fife Housing Association.
5. After receiving this letter, the Commissioner understands that Mrs Ogg contacted Fife Housing Association regarding this matter, and that it responded indicating that it was not responsible for the relevant pathway.
6. On 10 February 2011, Mrs Ogg wrote to the Council requesting a review of its handling of her information request. She highlighted that Fife Housing Association had informed her that the pathway was not its responsibility, but had been adopted by the Council.
7. The Council notified Mrs Ogg of the outcome of its review on 14 March 2011. It apologised for the confusion caused by its previous responses. It explained that it held a memo (which comprised legal advice) regarding the ownership and maintenance of the unadopted roads and pavements in the relevant area. Having considered this information to be environmental information, and so having considered the request in terms of the EIRs, the Council decided to withhold this legal advice under regulations 10(5)(b) and 10(4)(e) of the EIRs. (The Council's letter referred in error to regulation 10(5)(e) rather than 10(4)(e). However, its comments indicated that the relevant exception applies to internal communications, making clear it had intended to cite the exception in regulation 10(4)(e).)
8. The Council did advise Mrs Ogg that, after examining title sheets for properties in that area, the Council had concluded that it was not responsible for the maintenance, repair or renewal of the unadopted footpaths in that area. The Council also provided a copy of plans of the area showing the extent of its adoption of local paths and roads, and noted that the location in question appeared to comprise part of the unadopted footpaths. The Council also indicated that the relevant title deeds were available via the Registers of Scotland.
9. On 15 March 2011, Mrs Ogg wrote to the Commissioner, stating that she 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.
10. The application was validated by establishing that Mrs Ogg 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

11. On 6 April 2011, the Council was notified in writing that an application had been received from Mrs Ogg and was asked to provide the Commissioner with any information withheld from her. The Council responded with the information requested and the case was then allocated to an investigating officer.
12. 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 confirm which exceptions it was relying upon to withhold the legal advice and provide justification for its application of these exceptions.
13. The Council responded, confirmed it was relying upon regulations 10(4)(e) and 10(5)(b) of the EIRs and provided its submissions.
14. Mrs Ogg also provided full arguments in support of her position that the information should be disclosed. The arguments presented by both parties will be considered in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

15. 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 Mrs Ogg and the Council and is satisfied that no matter of relevance has been overlooked.
16. The Commissioner has been careful in this case to recognise the limited terms of Mrs Ogg's initial information request. This asked the Council to confirm whether or not the relevant footway has been adopted by the Council. The Council has responded by indicating that it has not adopted the relevant pathway. However, it has withheld the legal advice which records and explains its understanding of the ownership and maintenance responsibilities in the relevant area. The Commissioner notes that the withheld legal advice falls within the scope of Mrs Ogg's request only to the extent that it provides recorded information evidencing the Council's position that it has not adopted the relevant footway.

Handling in terms of the EIRs

17. From the point where the Council conducted a review of its initial handling of Mrs Ogg's request (which is the relevant point for the purposes of this decision notice), it dealt with Mrs Ogg's request in terms of the EIRs, having concluded that it 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).



18. 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.
19. As the information requested by Mrs Ogg concerns the ownership and responsibility of footpaths, it concerns measures such as plans or programmes likely to affect the elements of the environment including soil, land and landscape and natural sites or factors that can in turn affect these elements, such as substances, noise and waste. In the circumstances, therefore, the Commissioner is satisfied that the information requested by Mrs Ogg falls within the definition of environmental information set out in regulation 2(1), in particular part (c) of that definition insofar as it relates to plans and programmes.
20. The Commissioner therefore concludes that the Council acted correctly by considering Mrs Ogg's information request in terms of the EIRs.

Section 39(2) of FOISA – environmental information

21. 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 his conclusion that it is environmental information as defined by regulation 2(1).
22. 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 Mrs Ogg 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) – internal communications

23. Under regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications.
24. 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)).
25. 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.



26. The withheld information in this case is contained in a single memorandum communicated from a Council solicitor to another Council official. As such, the Commissioner is satisfied that the withheld information constitutes an internal communications for the purposes of the EIRs. He therefore concludes that the exception in regulation 10(4)(e) of the EIRs was correctly applied to this information.

Consideration of the public interest test

27. Having upheld the use of the exception contained within regulation 10(4)(e) to the information contained in the correspondence between the two Council employees, the Commissioner is required to consider the public interest test required by regulation 10(1)(b) of the EIRs. As noted above, the test specifies that a 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.
28. In its submissions to the Commissioner, the Council provided some background to the creation of the note explaining that it contained legal advice as to who was responsible for maintenance of roads and pathways in the area relevant to Mrs Ogg's information request. The Council noted that, following a fall that Mrs Ogg had suffered, her solicitors were seeking to ascertain maintenance responsibilities in order to raise a claim against the party responsible for maintenance.
29. The Council explained that the memo in question sets out the Council's detailed legal reasoning and therefore, if disclosed, would expose the Council's legal position in any future court action. The Council considered that if the legal advice were disclosed, then there would be a strong possibility that it would seriously hinder the Council's ability to defend any claim.
30. In considering the public interest, the Council concluded that there is a strong public interest in ensuring that the Council can discuss privately its legal responsibilities and that this information is not disclosed, especially where a court case is a possibility.
31. The Council did accept that Mrs Ogg (together with the other residents at the development) has a personal interest in this matter, but it was unable to accept that it is in the public interest for the Council to disclose internal legal advice, particularly where a claim is ongoing and disclosing this information may substantially prejudice the Council's ability to defend that claim.
32. Within her submissions, Mrs Ogg stated that there was a public interest in understanding the Council's position on the legal responsibility for the maintenance and inspection of the roads and pavements in the relevant area. She argued that there was a public interest in the residents in the area being privy to the information to allow them to report defects and hazards, and have them repaired by the relevant authority. Mrs Ogg's comments made clear that she believed that, notwithstanding the Council's assertion that it has not adopted the relevant footway, that it does hold responsibility for its maintenance.



33. The Commissioner recognises that there is weight to the arguments presented by both Mrs Ogg and the Council, but is mindful that the information under consideration constitutes legal advice. Although regulation 10(5)(d) (confidentiality provided by law) may have been a more appropriate exception to apply in these circumstances, the Commissioner recognises that the general public interest arguments in favour of withholding legal advice can equally apply to the exception in regulation 10(4)(e) in this case.
34. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48*, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally.
35. Having considered the public interest arguments on both sides, and while accepting that there might be reasons which would justify disclosing legal advice of this kind in certain circumstances, in this instance the Commissioner is not satisfied that the public interest in disclosure of this particular legal advice is sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal advisor and client.
36. In reaching this conclusion, the Commissioner has noted in particular in this case that the Council has communicated to Mrs Ogg the conclusions it has drawn on the basis of its legal advice, and so provided the confirmation (that the Council has not adopted the relevant footway and is not responsible for its maintenance) that was requested by Mrs Ogg.
37. Although the Commissioner recognises there would be some public interest in revealing legal advice explaining the Council's basis for reaching that conclusion, there is a weighty competing public interest in protecting the Council's ability to maintain the confidentiality of the legal advice. The Commissioner also recognised also that the research undertaken by the solicitor providing advice in this case involved the consideration of publicly available titles, and so could be undertaken by another person (or a solicitor acting on their behalf). In these circumstances, the Commissioner did not consider that the public interest in disclosing the information under consideration was sufficient to outweigh that in maintaining the confidentiality of the Council's legal advice.
38. Consequently, he accepts that the Council correctly withheld the information from Mrs Ogg under the exception in regulation 10(4)(e) of the EIRs.
39. As the Commissioner has found that the Council was entitled to refuse Mrs Ogg's request under regulation 10(4)(e) of the EIRs, he will not go on to consider the application to the information requested of regulation 10(5)(b) of the EIRs.



DECISION

The Commissioner finds that the Council complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mrs Ogg. In particular, he has found that it was entitled to withhold the information considered in this decision under regulation 10(4)(e) of the EIRs.

The Commissioner does not require the Council to take any action in response to this decision.

Appeal

Should either Mrs Ogg 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
29 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 –

...

- (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.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that

...

- (e) the request involves making available internal communications.

...