

Decision Notice

Decision 176/2014 Mr L and Glasgow City Council

Geotechnical report

Reference No: 201400471

Decision Date: 11 August 2014



Scottish Information
Commissioner

Summary

On 16 December 2013, Mr L asked Glasgow City Council (the Council) for a geotechnical report on Celtic Football Club's Westthorn training ground. The report was withheld on the basis that disclosure would, or would be likely to, prejudice substantially international relations. The Commissioner agreed that the report should be withheld.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) section 32 (International relations)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a), (b) and (c) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2) and (5)(a) (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 16 December 2013, Mr L asked the Council for a geotechnical report for the Westthorn training ground.
2. The Council responded on 13 January 2014, informing Mr L that it was dealing with his request under the EIRs. The Council provided Mr L with a summary of the key points of the report.
3. On 24 January 2014, Mr L emailed the Council requesting a review of its decision to withhold the report. He considered that as the European Commission had commenced a preliminary investigation relating to the sale of the land (see below), the public interest in disclosure outweighed any of the Council's concerns.
4. The Council notified Mr L of the outcome of its review on 24 January 2014. The Council maintained its previous response and in addition relied upon the exceptions in regulations 10(5)(a) and 10(5)(e) to withhold the full contents of the report.
5. On 28 February 2014, Mr L emailed 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 specified modifications.
6. The application was validated by establishing that Mr L made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 4 March 2014, the Council was notified in writing that an application had been received from Mr L and was asked to provide the Commissioner with the information withheld from him. The Council provided the information 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. The Council was asked to justify its reliance on any provisions of the EIRs it considered applicable to the information requested (with particular reference to the exceptions relied upon in its responses to Mr L).
9. The Council submitted that the contents of the report should be withheld under regulations 10(5)(a) and 10(5)(e) of the EIRs. The Council also identified some personal information within the report, which it considered exempt from disclosure under regulation 11(2) of the EIRs; it provided submissions on this point too.
10. The Council provided further submissions during the investigation.
11. During the investigation Mr L explained why he considered that it would be in the public interest for the withheld information to be disclosed. Mr L confirmed that the personal information withheld under regulation 11(2) of the EIRs could be excluded from the scope of the investigation and decision; accordingly, this information is not considered further in this decision.
12. Mr L did not take issue with the Council's decision to respond to the request under the EIRs. The Commissioner is content that this was the correct decision, given that the withheld information is environmental information as defined in regulation 2 of the EIRs, and she will not consider this aspect of the Council's handling of the case further in this decision.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr L and the Council. She is satisfied that no matter of relevance has been overlooked.

The complaint to the European Commission

14. Celtic Football Club (Celtic FC) leased a site at Westthorn, Glasgow from the Council; the lease had a termination date of November 2005. The lease conditions included a provision for Celtic FC to acquire the site at open market value. In 2004, Celtic FC commissioned a geotechnical report on the ground to inform its negotiations on the purchase of the site. Celtic FC passed the geotechnical report to the Council for discussion during the negotiations, which continued until 2007¹. The sale completed in April 2009.
15. In July 2013, the Council was notified that a complaint against it had been made to the European Commission, alleging that the Council had given state aid to Celtic FC in respect of certain land transactions (including the sale of Westthorn training ground). Initial

¹ Glasgow City Council Executive Committee minutes 30 November 2007 – Item 13
<https://www.glasgow.gov.uk/councillorsandcommittees/DocumentSearchPublic.asp#>

submissions were provided to assist the European Commission with its preliminary investigations in August 2013; further submissions were requested by and provided to the European Commission.

16. The Council confirmed to the Commissioner (3 July 2014) that the preliminary investigation of the European Commission was still underway and had not been completed.

Regulation 10(5)(a) – international relations

17. The Council relied upon regulation 10(5)(a) of the EIRs to withhold all the information within the report.
18. In terms of regulation 10(5)(a) of the EIRs, a Scottish public authority may refuse to make information available to the extent that its disclosure would, or would be likely to, prejudice substantially international relations, defence, national security or public safety. This exception must be interpreted in a restrictive way (regulation 10(2)(a)) and the public authority must apply a presumption in favour of disclosure (regulation 10(2)(b)).
19. The EIRs do not explain what is intended by the phrase “international relations”, but the Commissioner considers that the definition would include all factors covered by section 32(1) of FOISA (see the Appendix). Section 32(1)(a)(ii) of FOISA states that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially relations between the United Kingdom and any international organisation or international court.
20. The Aarhus Convention: An Implementation Guide², produced by the United Nations Economic Commission for Europe to assist in interpretation of the international convention from which the EIRs ultimately derive, states (at page 59) that the convention does not define the terms “international relations”, but suggests that the definition of such terms will be determined by the Parties consistent with international law.

Who would be substantially prejudiced by disclosure of the report?

21. The Council considered that disclosure of the report would, or would be likely to prejudice substantially relations between the United Kingdom and an international organisation, i.e. the European Commission.
22. For the purposes of the exception in regulation 10(5)(a), the Commissioner accepts that the European Commission should be defined as an international organisation, in line with the definition in section 32(3) of FOISA.

Substantial prejudice

The Council’s submissions about substantial prejudice

23. The Council explained that the sale of the land at Westthorn formed part of a contract concluded between itself and Celtic FC which comprised a number of individual land transactions. The Council commented that it has been required to provide evidence to the European Commission to demonstrate that it achieved market value for the site.
24. The Council explained that the geotechnical report had been commissioned by Celtic FC in 2004, with a view to assisting with negotiations over the open market value for acquisition of the site on termination of the lease. The report was passed to the Council as part of the

² <http://www.unece.org/fileadmin/DAM/env/pp/acig.pdf> (version in force at the time the authority dealt with the request)

process of agreeing the market value price. It formed a key aspect of the site valuation as it quantified the “abnormal costs” associated with the development of the site (“abnormal costs” being costs which are over and above the normal cost of developing a site).

25. The Council considered that the abnormal costs assigned to the ground conditions, as detailed in the withheld report, were fundamental to the European Commission’s preliminary investigation of whether the Council obtained market value in its sale of the Westthorn site to Celtic FC.
26. In its submissions to the Commissioner, the Council stated that there was a real risk that the European Commission’s consideration of the complaint would be undermined if information relating to the subject matter of the complaint was placed in the public domain before its preliminary investigations were concluded. The Council argued that interference with the European Commission’s considerations as to whether to open an in-depth investigation would prejudice substantially the relations between the Member State (the UK) and the EU. Consequently, this would prejudice substantially international relations in terms of regulation 10(5)(a) of the EIRs.
27. The Council explained that it does not have direct contact with European Commission representatives conducting the state aid investigation. As a state aid complaint is, in effect, a complaint against a Member State, the Council’s main point of contact is with the Scottish Government’s State Aid Unit. In turn, the Scottish Government conducts its communications with the UK Government’s Department for Business, Innovation and Skills, which conducts matters with the European Commission through the UK’s Permanent Representative.
28. The Council provided the investigating officer with copies of correspondence issued by the UK’s Permanent Representative in Brussels, which stated that the European Commission has advised that information which is being considered as part of a live state aid matter should not be disclosed in response to a request for information.
29. Separately, the UK Government told the Council that disclosure of information relating to a live state aid investigation would adversely affect relations between the Commission and the Member State concerned. The Council provided copies of the correspondence to the investigating officer.

Commissioner’s conclusions about substantial prejudice

30. The European Commission is conducting preliminary investigations into whether there was a breach of State Aid rules in relation to the sale of the Westthorn site. The European Commission’s website states³ that from the time it has received a complete notification, it has two months to reach a decision. The investigating officer queried this with the Council, as more than two months had passed since the notification was received. The Council explained that there had been a change in personnel investigating the case and the investigation was ongoing.
31. The Commissioner is satisfied that the case has been referred to the European Commission, and that the withheld information has been passed to the Commission for the purposes of its investigation. The case remains live.
32. All information requests must be considered on a case-by-case basis. Decisions to withhold or disclose information must relate to the specific information in each case. Regulation

³ http://ec.europa.eu/competition/publications/factsheets/state_aid_procedures_en.pdf

10(5)(a) does not create a blanket exemption for all correspondence between the United Kingdom and an international organisation. The Commissioner does not accept that the disclosure of documents in one case should be seen as setting a precedent for the routine disclosure of documents in all cases. In order for the exception to apply to the information withheld in this case, the Council must be able to demonstrate that the disclosure of the withheld report would, or would be likely to, prejudice substantially international relations.

33. The Commissioner takes the view that the damage caused (or likely to be caused) by disclosing the information must be both real and significant, as opposed to hypothetical or marginal. There must also be a genuine link between disclosure and the harm: it cannot simply be a remote or hypothetical possibility.
34. In her briefing on regulation 10(5)(a)⁴, the Commissioner emphasises that, in considering the application of this exception, authorities should be aware that it is the international relations and interests of the United Kingdom *as a whole* which should be at risk of substantial prejudice from the disclosure of information, not simply those of a component region, part, or sector of the UK, or indeed those of the public authority itself. Authorities should therefore only consider applying this exception if it can be clearly demonstrated that substantial prejudice to the international relations of the entire UK would, or would be likely to, result from the disclosure of information.
35. The briefing also states that the exception requires the public authority to concentrate on the potential impact that disclosure may have on a particular relationship or interest, rather than looking solely at the nature, content and/or sensitivity of the information. There may be circumstances where potentially controversial information concerning one state or international organisation may have little or no impact on their relations, whilst seemingly innocuous information may have a substantial impact. This may depend on the political relations and diplomatic sensitivities that exist at the time, or may depend on cultural, religious or legislative differences. Authorities should therefore consider the content of the information only in terms of the impact that it may have on particular relations or interests, were it to be disclosed.
36. Even if a negative reaction is anticipated following the disclosure of information, an assessment must be made as to whether this negative reaction would, or would be likely to, prejudice substantially international relations. There may be circumstances where the disclosure of information may cause diplomatic annoyance or irritation, but would not result in significant, long term harm to UK international relations. The timing of disclosure may also be an issue, and the risk of substantial prejudice may well change as time passes.
37. The Commissioner notes that correspondence from the European Commission and the UK's Permanent Representative in Brussels refer to the desirability of withholding "correspondence" and "documents", but make no direct or specific reference to the withheld report under consideration in this decision. It is not made explicit as to whether the views expressed by the European Commission and the UK's Permanent Representative in Brussels were reached after consideration of the specific information covered by Mr L's request, or whether there has been any consideration of the specific circumstances of this case. The Commissioner notes that the correspondence from the UK's Permanent Representative in Brussels and the UK Government does not explain why information

⁴ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section32/Section32.aspx>

provided to the Commission should be withheld, but simply advises that this should be the case.

38. That said, the Commissioner accepts that some weight should be given to the views of the UK's Permanent Representative in Brussels and the UK Government as it is the UK's Permanent Representative who conducts matters with the European Commission on behalf of the United Kingdom. Also, the views expressed in correspondence contain specific reference to information being considered in a live state aid case, so whether or not the comments were made in relation to the specific information, in the circumstances of this case, the Commissioner considers it highly unlikely that asking the question again, in relation to the specific information under consideration, would elicit a different response from the UK's Permanent Representative in Brussels and the UK Government.
39. The Commissioner must make her decision based on the circumstances that existed at the point the public authority notified the applicant of the outcome of its review; in this case, the relevant date is 20 February 2014, at which point the European Commission was still engaged in a preliminary investigation of the alleged breach of State Aid rules. If the European Commission had completed its investigation and issued its findings at that time, the Commissioner would have had to consider a different set of circumstances in coming to a decision.
40. The fact that the report is part of the evidence in a live State Aid investigation by the European Commission is of particular significance in this case; the Commissioner has taken due regard of this fact when reaching her conclusions.
41. The Commissioner considers that disclosure of the report during the European Commission's preliminary investigation would be likely to adversely affect its investigation, it could pre-empt the findings and open up to public debate a matter which has yet to be decided.
42. As a member state of the European Union, the United Kingdom has a duty to co-operate with investigations of this nature. The Commissioner considers that if the report was disclosed, while it was still part of the evidence in an ongoing State Aid investigation, it would be detrimental to the European Commission's ability to discharge its investigatory functions effectively and would be likely to risk prejudicing the UK's reputation with the European Commission in relation to the confidentiality of information provided for other investigations. Disclosure in this case would be likely to deter parties from providing detailed and candid submissions, and could substantially compromise the ability of the European Commission to conduct similar investigations in a candid and confidential manner.
43. In the circumstances, the Commissioner accepts that disclosure of the report would prejudice substantially, or be likely to prejudice substantially, international relations. She is therefore satisfied that the information is excepted from disclosure under regulation 10(5)(a) of the EIRs.

Public Interest

44. Having accepted that the exception in regulation 10(5)(a) applies to the information withheld from Mr L, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs. This 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.

Public interest arguments from Mr L

45. Mr L commented that the Council had deducted around £3.5 million from the value of the Westthorn ground when selling it to Celtic FC, which represented the estimated cost of dealing with “abnormals” or contamination. He considered that this level of discount could indicate a hazardous level and toxicity of pollution at Westthorn, which would be a matter of great concern in relation to public safety, likely to require the land to be fenced off with warning signs to deter public entry, and for SEPA to be notified. If the Westthorn site was polluted or hazardous to such an extent, he believed that the public interest in raising awareness of the dangers (by disclosing the report) outweighed any prejudice to international relations.
46. However, Mr L stated that SEPA have no record of any contaminant or hazardous pollutant that would be considered a danger to public health on the Westthorn site, and that other published reports indicate there is no pollutant or hazard on the site to explain the high level of discount which had been agreed in relation to remediation. He also noted that the Council itself had promoted an allotment⁵ adjacent to Westthorn site where members of the public grow vegetables for consumption. He therefore concluded that there were questions about the potential misuse of public funds, and for this reason it was in the public interest for the report to be disclosed.
47. Mr L considered that, as the Council is a public authority, the report should be regarded as public property and disclosed. Mr L submitted that the fact that the case is the subject of an EU state aid case meant the same arguments applied: if the EU is allowed to see the report, then the public should also be allowed to see the report. Mr L argued that disclosure of the information in the report would ensure taxpayers were informed of all the facts in the case.

Public interest arguments from the Council

48. The Council acknowledged the significant public interest in public authorities conducting land transactions in an open and transparent manner.
49. Against this, the Council considered that there to be a significant public interest in authorities being able to freely exchange information with a regulatory body, such as the European Commission, in order to ensure that the best possible decision is reached by the regulatory body in fulfilment of its functions. It argued that it was in the public interest that decisions can be reached in State Aid matters by following due process and allowing parties to make their representations and the Commission to make its decision without undue interference or influence.
50. In the circumstances, the Council submitted that the specific public interest in safeguarding the European Commission’s decision-making processes outweighed any public interest in disclosure of the information in the report.

The Commissioner’s conclusions on the public interest

51. The Commissioner accepts that disclosure of the information under consideration might enhance the public’s understanding of the final price achieved by the Council when it sold the land to Celtic FC, and the decisions taken by the Council.
52. The Commissioner also accepts there is public interest in ensuring that the European Commission can gather information and carry out State Aid investigations on the basis of

⁵ <http://www.activescotland.org.uk/ServiceProvider/Facility/index.html?id=94e851dd-49d2-4d02-b080-9adb00977edd>

candid and detailed submissions. Its ability to do this also goes some way to addressing the public interest in the use of public funds. The Commissioner considers this to be paramount and that there is substantial weight to the public interest in maintaining the exception in this case.

53. Having balanced the competing public interests in all the circumstances of this case, the Commissioner finds that the public interest in disclosure of the requested information is outweighed by that in maintaining the exception in regulation 10(5)(a) of the EIRs. She has not reached this conclusion lightly, but is satisfied that there is a substantial public interest in ensuring that the European Commission can complete its investigation without undue influence or distraction, and that this outweighs the public interest in releasing the contents of the report at this time. The Commissioner accepts that the Council was correct to withhold the information in the report under regulation 10(5)(a).
54. The Council applied the exception in regulation 10(5)(a) to all the information in the report. As the Commissioner has concluded that the exception applies and that the public interest lies in maintaining the exception rather than ordering disclosure, she is not required to consider any other exception cited by the Council to withhold information within the report.

Decision

The Commissioner finds that Glasgow City Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr L.

Appeal

Should either Mr L or the Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Rosemary Agnew
Scottish Information Commissioner
11 August 2014

Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

32 International relations

- (1) Information is exempt information if-
- (a) its disclosure under this Act would, or would be likely to, prejudice substantially-
 - (i) relations between the United Kingdom and any other State;
 - (ii) relations between the United Kingdom and any international organisation or international court;
 - (iii) the interests of the United Kingdom abroad; or
 - (iv) the promotion or protection by the United Kingdom of its interests abroad; or
 - (b) it is confidential information obtained from-
 - (i) a State other than the United Kingdom; or
 - (ii) an international organisation or international court.
- (2) For the purposes of subsection (1), information obtained from a State, organisation or court is confidential at any time while-
- (a) the terms on which that information was obtained require it to be held in confidence; or
 - (b) the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.
- (3) In subsection (1)-
- "international court" means an international court which-
- (a) is not an international organisation; and
 - (b) is established-
 - (i) by a resolution of an international organisation of which the United Kingdom is a member; or
 - (ii) by an international agreement to which the United Kingdom is a party;
- "international organisation" means-
- (a) an international organisation whose members include any two or more States; or
 - (b) an organ of such an international organisation;
- "State" includes-
- (a) the government of any State; and
 - (b) any organ of such a government,
- and references to a State other than the United Kingdom include references to any territory outwith the United Kingdom.

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

...

"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-

(a) international relations, defence, national security or public safety;

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info