

Decision Notice

Decision 016/2015: Trump International Golf Club Scotland Ltd and Aberdeen City Council

European Offshore Wind Farm Development Centre and Related Substation at Blackdog, Aberdeenshire

Reference No: 201402260

Decision Date: 10 February 2015



Scottish Information
Commissioner

Summary

On 28 May 2014, Trump International Golf Club Scotland Ltd (Trump International) asked Aberdeen City Council (the Council) for information concerning the European Offshore Wind Farm Development Centre (EOWFDC)¹ and related substation at Blackdog, Aberdeenshire. The Council disclosed some information and stated that it did not hold other information.

The Commissioner investigated and found that, in responding to the request, the Council had failed to identify and retrieve some information covered by the request. She required the Council to respond to Trump International's requirement for review for parts 2, 3, 5 and 6 of the request in terms other than regulation 10(4)(a) of the EIRs.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) and (2) (Duty to make available environmental information on request); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 28 May 2014, Trump International made a request to the Council for the following information (request reproduced in full).
 1. The unredacted Minutes of the meeting on 2 December 2009 comprising an Aberdeen offshore wind farm meeting and all drafts of said Minutes.
 2. The unredacted comprehensive note of the meeting on 2 December 2009 comprising an Aberdeen offshore wind farm meeting and all drafts of said note.
 3. Any agenda/briefing notes/record (formal or informal) in relation to the meeting on 2 December 2009 and any drafts thereof.
 4. All drafts of the letter of 19 September 2012 to Marine Scotland and any e-mail correspondence in relation to any drafts and/or the final letter.
 5. Any Minutes/notes/agenda/briefing notes/record (formal or informal) in final and/or in draft form relating to the above application that any representative from the Scottish Government attended with Aberdeen City Council.
 6. Any correspondence including but not limited to any e-mails, letters, notes, telephone calls in draft or final form created either before or after any meeting in relation to said meeting and/or said application and/or the confirmation of any minutes or notes of any such meetings.
2. The Council responded on 27 June 2014. The Council stated that it did not hold any information in relation to parts 1, 2, 3, 5 and 6 of the request in terms of regulation 10(4)(a) of the EIRs. In relation to part 4, it disclosed some information and withheld the remainder under the exception in regulation 11(2) of the EIRs (personal data).

¹ <http://corporate.vattenfall.co.uk/projects/wind-energy-projects/european-offshore-wind-deployment-centre/>

3. On 11 July 2014, Trump International requested a review of the Council's decision. It provided the Council with a copy of an email exchange which, in its view, showed that the Council held further information covered by the request.
4. The Council notified Trump International of the outcome of its review on 8 August 2014. The Council upheld its position with respect to parts 1, 2, 3 and 4 of the request, explaining the searches that had been carried out for relevant information. The Council stated that with respect to parts 5 and 6 of the request, it had prepared its response on the basis of information about direct meetings with the Scottish Government, and no such meetings had taken place. The Council acknowledged that there had been a meeting attended by both the Council and a representative of the Scottish Government, but stated that it did not hold any information in connection with the meeting. It maintained that the exception in regulation 10(4)(a) of the EIRs applied to parts 5 and 6 of the request.
5. On 15 September 2014, Trump International wrote to the Commissioner to apply 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. Trump International considered that the Council held the information that it had requested.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Trump International made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. Trump International confirmed the scope of its application on 13 October 2014.
8. On 20 October 2014, the investigating officer notified the Council in writing that an application had been received from Trump International, 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 explain the steps it had taken to establish the information which fell within the scope of Trump International's request.
9. On 18 November 2014, the Council provided detailed submissions on the searches it had undertaken. These searches had revealed that an archived email account of a former Council employee was still held by the Council. In checking this email archive, the Council had identified some information falling within scope of parts 2, 3, 5 and 6 of the request. The Council continued to assert that it did not hold any information with respect to part 1 of the request and it did not hold any additional information with respect to part 4 of the request.
10. During the investigation, the Council provided the Commissioner with further information on the extent of the searches it had conducted.

Commissioner's analysis and findings

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

Application of the EIRs

12. It is clear from the Council's correspondence with Trump International that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question relates to the wind farm and substation application and, as such, the Commissioner is satisfied that it would fall within either paragraph (a) or paragraph (c) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in Appendix 1 to this decision). Trump International has not disputed the application of the EIRs in this case and the Commissioner will consider her request in what follows solely in terms of that regime.

Scope of investigation

13. The investigating officer discussed the scope of the investigation with the Council, and whether the Commissioner could consider all matters raised in the application from Trump International.
14. The Commissioner's investigation and decision is limited to whether the Council complied with the EIRs in dealing with the request and the request for review submitted by Trump International. Only information covered by the terms of the original request can be considered in relation to the matters of dissatisfaction raised by Trump International in its request for review.
15. The Commissioner informed the Council that parts 5 and 6 of the request should be interpreted to encompass information about meetings with the Scottish Government's agencies and directorates, as well as meetings with Scottish Government officials.
16. The Commissioner noted that Trump International argued that searches for information covered by the request should cover the period 22 January 2009 to 15 January 2010, and raised this point with the Council. The Council considered it unlikely that extending searches for information to cover the whole time period identified by Trump International (22 January 2009 to 15 January 2010) would identify any further information. It explained that the timeframe for setting up a meeting is usually one month prior to the meeting being held, so a search start date of 1 October 2009 (two months prior to the meeting) was considered by the Council to be appropriate. The Council stated that it was only a facilitator of the meeting of 2 December 2009 and so any information held by the Council would be limited to that purpose.
17. The Commissioner accepts this explanation and does not require the Council to extend the date parameters of its searches.
18. The Commissioner cannot consider the other matters raised by Trump International, which fall outside the scope of the request submitted on 28 May 2014, or which relate to matters not raised in Trump International's request for review.

Regulation 5(1) of the EIRs

19. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold, but which is not in fact held.

20. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

Was all relevant information identified, located and provided by the Council?

21. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. She will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
22. Trump International noted that the EOWFDC was being developed by Aberdeen Offshore Wind Farm Ltd (a joint venture between Vattenfall and Aberdeen Renewable Energy Group (AREG), plus development consortium partner Technip). Trump International referred to a press article dated 9 April 2014² which stated that the Council was to bring AREG's economic development activities in-house, to increase resources for these activities and to enable the organisation to concentrate on supporting its membership and providing supply chain services. Trump International submitted that, as AREG had been subsumed into the Council's operations, the Council should hold information from AREG which fell within the scope of the request.
23. The Council was asked to clarify whether it held any information that had been created by AREG. The Council responded that AREG was, and is still is, a separate body from the Council, and the news article referenced by Trump International had been incorrect to state that AREG had been subsumed into the Council's operations.

Details of the Council's searches

24. Eleven Council employees were named in documents about the wind farm and substation already disclosed by the Scottish Government^{3,4}. The Council was asked whether these individuals had searched their records for the requested information. The Council explained that only three of these people were currently employed by the Council. The relevant records of two of these employees had been searched, but the third employee had been seconded to work for AREG full time, so Council records for this employee were limited.
25. The Council provided details of the searches it had conducted. It explained that the Enterprise, Planning and Infrastructure Directorate (EPI), which covers economic development and planning functions within the Council, was the only relevant Directorate that would be likely to hold any pertinent information. The electronic shared drive and mailbox of the EPI Director had been searched, as had electronic shared drive for files created by an EPI Director who no longer worked for the Council. No information was located in either case.
26. The Council also obtained submissions from the author of the letter described in part 4 of the request and from the individual who organised the meeting mentioned in part 6 of the request. These confirmed that no information had been identified falling in scope of the request.

² <http://www.agcc.co.uk/news-main/item/23792-areg-streamlines-it-structure-to-boost-membership-services/>

³ <http://www.scotland.gov.uk/resource/0039/00392983.pdf>

⁴ <http://www.scotland.gov.uk/Topics/marine/science/Publications/MSFOIEIrDisclosures/AberdeenWindFarm>

27. The Council stated that it considered its searches had been extensive and appropriate. The individuals who were asked to search records were of a suitable level of seniority, and were experts with the appropriate level of knowledge in relation to the Council's involvement in the processes and activities which are the subject of the request.
28. The Council provided details of its email archive process, explaining that although its Information Technology (IT) system automatically archives emails every ninety days, officers are still able to access the archived emails. Archived emails are not automatically deleted and are manually deleted by officers at their own discretion. When an officer leaves the Council, it is their responsibility to identify with their line manager which emails need to be kept.
29. The Council's IT service receive a list of "leavers" from Human Resources service on a monthly basis. The IT service can also receive requests direct from Line Managers to inform them of leavers in their teams. Once the Council's IT service has been informed that a staff member has left, their account is disabled and placed in a holding area. These accounts are held for one month and then deleted. When an officer's account is deleted both the live mailbox and the archive are deleted. There is a backup retention period of three months, so from the point of deletion the Council has a three month period in which it can restore a mailbox or archive.
30. The Council explained that, following discussions with its IT department, it had found one individual's email archive that had not been permanently deleted and a search of this archive had identified emails containing information that fell within scope of parts 2, 3, 5 and 6 of the request. The Council undertook to review these emails to see what information could be disclosed to Trump International.
31. The Council was also asked to consider the Commissioner's view that parts 5 and 6 of the request could relate to meetings with agencies and directorates of the Scottish Government, as well as meetings with the Government's own officials. The Council considered it unlikely that any further information would have been found, as Marine Scotland had already been identified as a possible "agency of the Scottish Government" and included in the key word searches undertaken by the Council, so any relevant information would have been captured.
32. Having considered the submissions provided by the Council, the Commissioner is satisfied its searches were reasonable and proportionate, and would have been likely to identify any relevant recorded information held by the Council.

Part 4 of the request – is further information held?

33. Part 4 of the request sought all drafts of a letter of 19 September 2012 to Marine Scotland and any e-mail correspondence in relation to any drafts and/or the final letter. The Council submitted that it had received confirmation from the author of the letter that no further information was held, other than that disclosed to Trump International in response to its request.
34. Having considered the Council's submissions and the searches it carried out when responding to the request and in response to the investigating officer's correspondence, the Commissioner is satisfied the Council has identified and provided all the relevant recorded information which it holds in relation to part 4 of the request.

Part 1, 2, 3, 5 and 6 of the request – is any further information held?

35. Regulation 10(4)(a) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received.
36. During the investigation, the Council provided details of the searches that it had conducted, and confirmed that it had now identified information falling within scope of parts 2, 3, 5 and 6 of the request. The Council stated that it was considering disclosing a redacted version of the information it had found. It was satisfied that it did not hold any information with respect to part 1 of the request.
37. The Commissioner's decision is based on the circumstances that existed at the time of the Council's review of its handling of the request from Trump International.
38. In its review response of 8 August 2014, the Council stated that it did not hold any information falling within scope of parts 2, 3, 5 and 6 of the request and that the exception in regulation 10(4)(a) of the EIRs applied. As the Council has now identified information that falls within these parts of the request, the Commissioner has concluded that the Council was incorrect to inform Trump International that it did not hold any information covered by these parts of the request and that the exception in regulation 10(4)(a) of the EIRs was wrongly applied. She also finds that the Council failed to comply with regulation 5(1) of the EIRs, in that it failed to make environmental information available within 20 working days of receiving a request for that information, or to state why it was not required to do so in terms of regulations 6 to 12 of the EIRs.
39. With respect to parts 2, 3, 5 and 6 of the request, the Commissioner requires the Council to respond to Trump International's requirement for review in terms other than regulation 10(4)(a) of the EIRs.
40. In relation to part 1 of the request, the Commissioner is satisfied the Council's searches were reasonable and proportionate and she accepts (on the evidence of these searches) that the Council does not hold any information falling within scope of this part of the request.
41. Before accepting that the exception in regulation 10(4)(a) of the EIRs was correctly cited in relation to part 1 of the request, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs.

The public interest test in relation to part 1 of the request

42. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs and can only apply if, in all the circumstances, the public interest in maintaining the exception outweighs the public interest in making the information available.
43. The Commissioner is satisfied that the Council does not hold the information sought by Trump International in part 1 of its request. Consequently, she does not consider there to be any conceivable public interest in requiring that the information be made available. The Commissioner therefore concludes that the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.
44. The Commissioner is satisfied, therefore, that the Council was entitled to refuse part 1 of Trump International's request under regulation 10(4)(a) of the EIRs, on the basis that it did not hold the requested information.

Decision

The Commissioner finds that Aberdeen City Council (the Council) failed to comply in full with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Trump International Golf Club Scotland Ltd (Trump International).

The Commissioner finds that the Council

- (i) did not hold any information with respect to part 1 of the request and correctly applied the exception in regulation 10(4)(a) of the EIRs to part 1;
- (ii) provided Trump International with all the information it held covered by part 4 of the request, in line with regulation 5(1) and (2) of the EIRs
- (iii) wrongly applied the exception in regulation 10(4)(a) to information covered by parts 2, 3, 5 and 6 of the request and, in so doing, failed to comply with regulations 5(1) and (2) in respect of the information it held.

The Commissioner requires the Council to respond to Trump International's requirement for review in relation to parts 2, 3, 5 and 6 of the request, in terms other than regulation 10(4)(a) of the EIRs, by **27 March 2015**.

Appeal

Should either Trump International 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.

Enforcement

If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner

10 February 2015

Appendix 1: Relevant statutory provisions

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;

...

(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)-

(a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and

(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

(a) it does not hold that information when an applicant's request is received;

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info