

Decision Notice

Decision 159/2015: Friends of Loch Etive and Argyll and Bute Council

Section 75 agreement

Reference No: 201500282

Decision Date: 14 October 2015



Scottish Information
Commissioner

Summary

On 30 January 2014, Friends of Loch Etive (FLE) asked Argyll and Bute Council (the Council) for correspondence and other information relating to a proposed section 75 planning agreement. The Council's response was appealed to the Commissioner and resulted in *Decision 242/2014*.

On 24 November 2014, FLE made a further request, asking again for correspondence and other information relating to the agreement, plus all information relating to the section 75 agreement, covering the period 30 January 2014 to the date of completion of the agreement and a copy of a plan. The request acknowledged that circumstances had changed since the previous request: a judicial review, previously only threatened, was underway at the time.

The Council responded under the EIRs, supplying a copy of the plan but withholding the remainder of the information under regulations 10(4)(e) and 10(5)(e) of the EIRs. Following a review, FLE remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council responded to FLE's request for information in accordance with the EIRs.

Relevant statutory provisions

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), (4)(e), (5)(e) and (6) (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. In this decision, all references to communications with FLE should be read as including communications with FLE's solicitor acting on their behalf.
2. On 30 January 2014, FLE asked the Council for information. The information requested related to a planning application for a fish farm at Loch Etive. Part of this request sought all correspondence to or from any party and any other information held by the Council, concerning the proposed section 75 agreement.
3. The request detailed above was ultimately appealed to the Commissioner, resulting in *Decision 242/2014 Friends of Loch Etive and Argyll and Bute Council*¹. This decision concluded that the Council was entitled to withhold information under regulation 10(5)(e) of the EIRs.
4. On 24 November 2014, FLE made another request for information to the Council. On this occasion, FLE sought the same information as requested in January 2014 and, in addition, all information held by the Council concerning the proposed section 75 agreement, covering

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2014/201400694.aspx>

the period 30 January 2014 to the date of completion of the agreement. FLE also sought a copy of a plan.

5. The Council responded on 22 December 2014, supplying a copy of the plan requested, but withholding the remaining information on the basis that regulations 10(4)(e) and 10(5)(e) applied.
6. On 8 January 2015, FLE wrote to the Council requesting a review of its decision. They did not accept that the exceptions or the public interest test had been applied correctly.
7. The Council notified FLE of the outcome of its review on 5 February 2015. It supplied FLE with additional information, but confirmed that the remainder was appropriately withheld on the basis that regulations 10(4)(e) and 10(5)(e) applied.
8. On 12 February 2015, FLE wrote to the Commissioner. FLE applied 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. FLE stated they were dissatisfied with the outcome of the Council's review because they did not accept that the exceptions cited continued to apply to the information withheld.

Investigation

9. The application was accepted as valid. The Commissioner confirmed that FLE 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.
10. On 24 February 2015, the Council was notified in writing that FLE had made a valid application. The Council was asked to provide the Commissioner with the information withheld from them. The Council provided the information and the case was allocated to an investigating officer.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions, focusing on the requirements of the exceptions it had cited in communications with FLE.

Commissioner's analysis and findings

12. 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 FLE and the Council. She is satisfied that no matter of relevance has been overlooked.
13. Planning permission for a new fish farm on Loch Etive was granted by the Council in January 2014, conditional on a section 75 planning agreement² that impacted upon two other fish farms.
14. The decision of the Council to grant planning permission was subject to judicial review proceedings which, although now completed, were ongoing at the time of FLE's (24 November 2014) request for information.

² Section 75 of the Town and Country Planning (Scotland) Act 1997

15. The Council responded to FLE's request under the EIRs. FLE did not challenge this in their application and, having considered the withheld information, the Commissioner is satisfied that it falls within the definition of "environmental information" contained in regulation 2(1) of the EIRs. In what follows, the Commissioner will consider the handling of the request solely in terms of the EIRs.

Regulation 10(5)(e)

16. Regulation 10(5)(e) of the EIRs 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.
17. As with all exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be disclosed 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)).
18. The Aarhus Convention: an Implementation Guide³, which offers guidance on the interpretation of the convention from which the EIRs are derived, notes (page 88) that the first test for considering this exception is whether national law expressly protects the confidentiality of the withheld information. The law must explicitly protect the type of information in question as commercial or industrial secrets. Secondly, the confidentiality must protect a "legitimate economic interest": this term is not defined in the Convention, but its meaning is considered further below.
19. Having taken this guidance into consideration, the Commissioner's view is that before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
- (i) Is the information commercial or industrial in nature?
 - (ii) Does a legally binding duty of confidence exist in relation to the information?
 - (iii) Is the information publicly available?
 - (iv) Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

Is the information commercial or industrial in nature?

20. The Council submitted the same arguments as those presented in *Decision 242/2014*, stating that the withheld information was commercial in nature as it related to discussion/negotiations between the parties and their solicitors regarding the assumption of obligations/undertakings that would affect the parties' ability to undertake commercial activities upon Loch Etive.
21. The Commissioner has considered the information and is satisfied that it all represents a single negotiation process, which was continuing at the time of the 14 November 2014 request. Therefore, she accepts that the information is commercial in nature.

³ http://www.unece.org/env/pp/implementation_guide.html

Does a legally binding duty of confidence exist in relation to the information, and is the information publicly available?

22. In the Commissioner's view, confidentiality "provided for by law" will include confidentiality imposed on any person under the common law of confidence, under a contractual obligation or by statute.
23. The Council submitted that there was a legally binding common law duty of confidence between the parties involved in the discussions/negotiations relating to the formation of any contract. On this basis, it argued, the information in the withheld correspondence (as it relates to these discussions/negotiations) should remain confidential. The withheld information, it submitted, related to the negotiation of the specific terms of the section 75 agreement.
24. In the circumstances, having considered the Council's submissions and the withheld information, the Commissioner is satisfied that an implied duty of confidence existed in relation to these exchanges. She notes that the exchanges are negotiations about the section 75 agreement. The Commissioner is also satisfied that the information was not publicly available at the time the Council responded to FLE's request (and, for that matter, has not become so subsequently).

Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

25. The term "legitimate economic interest" is not defined in the EIRs. In the Commissioner's view, the interest in question should be financial, commercial or otherwise "economic" in nature. The prejudice to that interest must be substantial: in other words, it must be of real and demonstrable significance.
26. The Council submitted that, at the time of the request and the review, the judicial review hearing had not taken place and it considered there was a real risk of harm to the Council and other interested parties if the information were to be disclosed. In the Council's view, disclosure of details of the negotiations with third parties could have materially affected the ability of the Council and third parties to defend the court action.
27. The Council went on to explain that, at the time of the request, the planning permission had been implemented by the developer and so they would have made a considerable financial investment in putting into place the new fish farm, equipment, staff and supply contracts, with the result that disclosure could have a direct or indirect adverse impact on jobs and related business activity. The developer had a legitimate interest in the withheld information remaining confidential. The Council noted that the outcome of the judicial review could have meant that the section 75 agreement required to be revisited, and there was a real risk of financial harm to the developer should they be prejudiced in any future negotiations (as they would be if the withheld information did not remain confidential).
28. FLE argued that as the section 75 agreement, which was at the heart of this request, had been finalised and published, planning permission had been granted and judicial review proceedings had commenced, all at the time of the request, there could have been no substantial prejudice to any legitimate economic interest to protect against. Such prejudice as might exist had already been "crystallised" by the events described.
29. FLE submitted that, by the time of the request, it had already fallen to the Court of Session to decide (by way of the judicial review proceedings) whether or not there were sufficient

grounds to quash the section 75 agreement and the planning permission, and hence to protect any legitimate economic interest of a third party.

30. The Commissioner has considered carefully the arguments presented by both parties. She is satisfied that disclosure of the withheld information, in response to FLE's request, would have been likely to cause substantial harm to a legitimate economic interest. In reaching this conclusion, she has not accepted the arguments presented by FLE. At the time of the request, the outcome of the judicial review proceedings was not known and, as stated by the Council, the developer had started work on implementation of the planning permissions that had been granted.
31. In reaching this conclusion, the Commissioner has considered FLE's arguments about the effect of the judicial review proceedings having started. She cannot accept them. The Court was asked to consider the Council's actions in relation to the planning process. If it had found against the Council, the renegotiation of the section 75 agreement would have been a distinct possibility. In that context, the Commissioner cannot ignore the prospect of harm to the legitimate economic interests of third parties, should the withheld information be disclosed. She has to consider the position at the time of the request (or, at the very latest, the time of the review) and she cannot take into account the fact that the Court reached a decision subsequently, dismissing FLE's petition.
32. The Commissioner is satisfied, therefore, that the Council was entitled to apply the exception in regulation 10(5)(e) to the information requested.

The public interest

33. Having accepted that the exception in regulation 10(5)(e) applies to the information withheld from FLE, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs. This states 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.
34. The Council concluded that it was not in the public interest for the information to be disclosed. It acknowledged a public interest in being open and transparent in relation to the planning process and the implementation of planning decisions. However, this was outweighed by public interest in maintaining confidentiality and ensuring that a legitimate economic interest was not harmed substantially.
35. The Council also explained that the outcome of the judicial review was not known at the time of the request (or, for that matter, at the time of its submissions) and it was not in the public interest for the withheld information to be disclosed into the public domain prior to completion of that process. It could open the matter up to public scrutiny prior to the outcome being decided by the Court. In relation to the public interest, the Council also highlighted the prejudice to its ability to re-determine the planning application and enter into a new section 75 agreement, should that be necessary once the outcome of the judicial review was known.
36. FLE submitted that the Council had reached what it had defended publicly as being an impartial and appropriate decision to agree the section 75 agreement and grant planning permissions. So any argument that the public interest still lay in the Council being able to consider its policy options behind closed doors had diminished. In FLE's view, any public interest in being able to consider policy options behind closed doors had been "overtaken" by the public interest in transparency in the planning system, which the Council itself

recognised. More generally, FLE argued that the Council had failed to consider the public interest test appropriately in light of changed circumstances since the previous request for the information.

37. The Commissioner has considered these public interest arguments carefully. She must consider the arguments in light of the prevailing circumstances at the time of this request and review. In doing so, she must bear in mind that the judicial review proceedings had not yet concluded.
38. The Commissioner acknowledges that there will generally be a public interest in a transparent and accountable planning process. In fact, most aspects of this process are open to public scrutiny: negotiations of this kind are a significant exception.
39. However, there are arguments of considerable force supporting the public interest in maintaining the exception. The Commissioner has already concluded that disclosure of this information would be likely to cause substantial harm to a legitimate economic interest. She has concluded that this harm remained likely, even after the judicial review proceedings had started.
40. As indicated above, the judicial proceedings were under way at the time of the request and review. The Commissioner agrees that at that time, the public interest lay in the Court being allowed to complete those proceedings and reach a decision. That task might well have been inhibited by opening the matters under consideration by the Court to additional public scrutiny, outwith the judicial review process.
41. Once the Court had reached a conclusion, if it found against the Council, it is likely that the Council would have been required to revisit the planning permission. As indicated above, this might well have led to negotiations in relation to a further section 75 agreement. It may be apparent now that such fresh negotiations will not be required, but that was not apparent at the time of the request and review. The Commissioner accepts that disclosure in the context of this request would have been likely to make that task of negotiation more challenging for the Council, in addition to the potential commercial harm to third parties identified above. That would not have been in the public interest.
42. In all the circumstances of the case, taking full account of the arguments presented by both parties, the Commissioner finds that the public interest in maintaining the exception outweighed that in making the information available, at the time the Council dealt with FLE's request.
43. The Commissioner concludes that the Council was entitled to withhold this information under regulation 10(5)(e), assuming regulation 10(6) did not apply to the information.

Regulation 10(6)

44. Regulation 10(6) of the EIRs states that a Scottish public authority is not entitled to refuse to make information available under a number of exceptions (including that in regulation 10(5)(e)) to the extent that it relates to information on emissions.
45. FLE stated its continued belief that some of the information withheld was information relating to emissions, specifically that which related to licensing under the Controlled Activities Regulations.
46. The Commissioner has considered the information withheld and she is not satisfied that the information relates directly enough to emissions to engage regulation 10(6). Information

falling within this category relates to the licensing process, as opposed to the regulatory functions of the licence or the matters regulated.

47. There being no basis for applying regulation 10(6), the Commissioner concludes that the Council was correct in its application of regulation 10(5)(e) to the information requested by FLE.

Regulation 10(4)(e)

48. Under regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that it involves making available internal communications. In order for information to fall within the scope of this exception, it need only be established that the information is an internal communication. If the Commissioner decides that a document is an internal communication, she will be required to go onto to consider the public interest test.
49. The Council stated that the information withheld under this exception comprised internal communications between officers of the Council. The Council highlighted that it had disclosed some of these, where it did not believe it could meet the public interest test. The remaining information related to negotiations of the specific terms of the section 75 agreement and contained commercial information which had been supplied by third parties.
50. Having considered the information withheld by the Council under this exception, the Commissioner is satisfied that all of this information comprises internal communications and is therefore subject to the exception in regulation 10(4)(e). She must therefore go on to consider whether, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

The public interest

51. The Council explained that it had disclosed internal communications where it considered the public interest in making the information available outweighed that in withholding it. Those that remained withheld compromised internal exchanges about the negotiation of the specific terms of the section 75 agreement and contained commercial information supplied to the Council in confidence. It highlighted the substantial harm discussed above, as outcomes which would not be in the public interest.
52. The Council acknowledged the public interest in ensuring that it was open and transparent in relation to the planning process and the implementation of planning decisions. On balance, it concluded that the public interest in maintaining the exception outweighed that in disclosure.
53. FLE submitted similar public interest arguments to those considered above in relation to regulation 10(5)(e) above. More generally, FLE believed the Council had misapplied the public interest test and had subordinated its duties under the EIRs to the interest of its own position as a respondent in judicial review proceedings, and was therefore wrong in concluding that the public interest lay in non-disclosure.
54. The Commissioner has considered all of these submissions carefully, alongside the withheld information, which she accepts contains the Council's internal discussion of the information provided by the third parties, which she has accepted as properly withheld under regulation 10(5)(e). She has taken account of FLE's submissions, but is satisfied that the Council considered the public interest separately in relation to each exemption: given the nature of the information, it is inevitable that these arguments are interrelated.

55. In general terms, the Commissioner accepts the strong public interest in transparency in relation to the planning process. However, in the circumstances of this particular case, at the time of this request, the Commissioner accepts that there was a stronger public interest in maintaining the exception than in disclosure.
56. In reaching this conclusion, the Commissioner would apply the same basic reasoning as in relation to regulation 10(5)(e) (see above). It would not have been in the public interest to disclose this information before the Court had been given the opportunity to reach a conclusion on the judicial review. In addition, disclosure would have been likely to harm the ability of both the Council and third parties to address a possible outcome of that judicial review, which would not have been in the public interest.
57. Consequently, the Commissioner concludes that the Council was entitled to rely on regulation 10(4)(e) to withhold information.

Decision

The Commissioner finds that Argyll and Bute Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Friends of Loch Etive.

Appeal

Should either Friends of Loch Etive or Argyll and Bute 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

14 October 2015

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.

- (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;

...

- (6) To the extent that the environmental information to be made available relates to information on emissions, a Scottish public authority shall not be entitled to refuse to make it available under an exception referred to in paragraph (5)(d) to (g).

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info