

Decision Notice

Decision 017/2016: Councillor McCabe and Falkirk Council

Planning information

Reference No: 201501213, 201501336, 201501340 and 201501644

Decision Date: 28 January 2016



Scottish Information
Commissioner

Summary

On 9 and 27 February 2015, 23 April 2015 and 19 June 2015, Councillor McCabe made a number of information requests to Falkirk Council relating to the Denny Regeneration Project. The Council provided some information whilst withholding other information as commercially sensitive and legally privileged.

Following an investigation, during which the Council disclosed further information, the Commissioner found that in some respects the Council had failed to deal with Councillor McCabe's requests in accordance with Part 1 of FOISA and the EIRs. She was, however, satisfied that the Council was entitled to withhold a limited amount of information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(6) (General entitlement); 2(1)(b) (Effect of exemptions); 20(1), (5)(a) and (b)(i) and (6) (Requirement for review of refusal, etc.); 33(1)(b) (Commercial interests and the economy); 39(2) (Health, safety and the environment)

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

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

Background

Request 1

1. On 9 February 2015, Councillor McCabe wrote to the Council. He referred to an earlier meeting regarding the Denny Regeneration Project, and in relation to the interest the Council had received in Phase 2 of the development, asked the Council for information which included:
 - a) *Who are the interested parties?*
 - b) *Can I have copies of drawings submitted in support of both applications?*
2. The Council responded on 27 February 2015. It informed Councillor McCabe that submissions were the subject of a report to a meeting of the Executive on 24 February 2015. It stated that Councillor McCabe had a copy of that report, but it provided him with a link to it on the Council's website.
3. The Council further explained that it would be inappropriate to release details of the submissions in order to respect the interests of both the Council and the interested commercial bodies. It further stated that it wished to avoid a situation that might cause disruption of the project and any related risks to the Council.

4. On 8 April 2015, Councillor McCabe wrote to the Council and requested a review regarding a response he had received to a different request (request 2 below). In relation to the response of 27 February 2015, he stated that he would make an application to the Commissioner.
5. On 23 April 2015, Councillor McCabe wrote to the Commissioner, applying for a decision under section 47(1) of FOISA. He was informed that he had not sought a review of the initial response and so this application was not valid.
6. On 19 June 2015, Councillor McCabe wrote to the Council, requiring a review of its decision of 27 February 2015.
7. The Council notified Councillor McCabe of the outcome of its review on 15 July 2015. The Council confirmed that the information sought was correctly withheld in terms of section 33 of FOISA (Commercial interests).
8. On 16 July 2015, Councillor McCabe wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Councillor McCabe stated he was dissatisfied with the outcome of the Council's review because he had not been provided with the information he asked for. (He also stated he wished correspondence with both parties, but this had not been requested.)

Request 2

9. On 27 February 2015, Councillor McCabe made a request for information to the Council. In relation to the Denny Regeneration Project, Councillor McCabe asked for:
... all correspondence, minutes of meetings, emails; telephone calls and any other documentation between Falkirk Council and SGM, the Council's appointed property agents involved in the marketing of Phase 2 of the regeneration.
10. The Council responded on 24 March 2015. It provided some information to Councillor McCabe. It informed Councillor McCabe that information had been redacted from the email chains provided as it related to internal communications or communications with third parties, and so did not fall within the scope of the request (see request 4 below).
11. The Council went on to explain that while it was common knowledge there were two bidders, the identities of the bidders and details of those bids were not commonly known. Therefore, it had redacted or removed some information, under section 33(1)(b) of FOISA, as disclosure would be prejudicial to the commercial interests of previous bidders, other interested parties and the Council. It also stated that further information had been removed under section 36(1) of FOISA, as it was considered to be legally privileged.
12. On 8 April 2015, Councillor McCabe wrote to the Council, requesting that it review its decision not to provide the withheld information.
13. The Council notified Councillor McCabe of the outcome of its review on 7 May 2015, upholding its original decision to withhold the information. The Council also explained that to avoid duplication it had only provided the first page of each email chain that it held, where (for example) page two had been provided elsewhere or did not fall within scope of the request.
14. On 19 June 2015, Councillor McCabe wrote to the Commissioner. He 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. In summary, Councillor McCabe stated he was dissatisfied with the outcome of the Council's review because he knew pertinent information had not been provided.

15. Councillor McCabe confirmed that he was not seeking information covered by section 36(1) of FOISA, but challenged the Council's application of section 33(1)(b). He was also dissatisfied that the emails provided were incomplete.

Request 3

16. On 23 April 2015, Councillor McCabe made a request for information to the Council. The information requested was:

... all developer correspondence received by Development Services for the first marketing exercise for Phase 2 of the Denny Town Centre Regeneration project... limited to prior to 24 February 2015.

The information I am requesting includes – but is not limited to – PQQs, tender documentation, bids submitted (including 2 withdrawn bids), minutes of meetings, drawings, telephone call transcripts and any other information between the Council and any developers who expressed an interest.

17. The Council responded on 22 May 2015. It explained that it considered the request of 23 April 2015 to be substantially similar to his earlier request of 27 February 2015 (request 2 above). As it did not consider there was any potential for additional information to fall within the scope of this new request, the Council considered request 3 to be repeated and so refused it under section 14(2) of FOISA.
18. On 19 June 2015, Councillor McCabe wrote to the Council, requiring a review of its decision not to provide him with the information requested.
19. The Council notified Councillor McCabe of the outcome of its review on 15 July 2015. The Council confirmed its view that request 3 was, for the most part, substantially similar to request 2. It did not consider a reasonable time had elapsed between the two requests. The Council confirmed that it was not obliged to comply with most of his request under section 14(2).
20. The Council went on, however, to confirm that it held two emails not covered by the request of 27 February 2015. It provided the emails to Councillor McCabe, redacted so as not to disclose the identity of the architects/developers, and withholding the plans said to be attached. It considered the information it was withholding to be commercially sensitive, as explained in its response to request 2 above.
21. On 20 July 2015, Councillor McCabe wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. As indicated above, Part 4 of FOISA applies (with modifications) to the enforcement of the EIRs. Councillor McCabe stated he was dissatisfied with the outcome of the Council's review because he did not accept the Council's application of section 14(2). He believed there to be additional relevant information held.

Request 4

22. On 19 June 2015, Councillor McCabe made a request for information to the Council. The information requested was:

... all internal communications relevant to the matter of Falkirk Council and SGM? This is the information that you have suggested in your letter of 7 May 2015 [the response to request 2] has been excluded from FOI 90881.
23. The Council responded on 15 July 2015. It provided Councillor McCabe with some of the information held, explaining that other information had been omitted or redacted on the basis that sections 33(1)(b) and 36(1) of FOISA applied. It provided additional background and contextual information
24. On 21 July 2015, Councillor McCabe wrote to the Council, requiring a review of its decision not to provide all of the information requested.
25. The Council notified Councillor McCabe of the outcome of its review on 19 August 2015. It upheld the original response, clarifying aspects of its interpretation of the request.
26. On 31 August 2015, Councillor McCabe wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. As indicated above, Part 4 of FOISA applies to the enforcement of the EIRs, with modifications. Councillor McCabe disagreed with the Council's application of exemptions and, referring to its handling of all his requests, submitted that the Council's response was designed to conflate and cause confusion.

Investigation

27. Councillor McCabe's applications were accepted as valid. The Commissioner confirmed that Councillor McCabe made these requests for information to a Scottish public authority and asked the authority to review its responses to the requests before applying to her for a decision.
28. On 21 July 2015 (in relation to request 2), 14 August 2015 (in relation to request 1), 7 September 2015 (in relation to request 3) and 28 September 2015 (in relation to request 4), the Council was notified in writing that Councillor McCabe had made valid applications as outlined above. The Council was asked to send the Commissioner the information withheld from him. The Council provided the information and the cases were allocated to an investigating officer.
29. 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 Councillor McCabe's applications, and answer specific questions relating to its handling of his requests. It was asked whether it should have handled any of the requests under the EIRs rather than FOISA. Further correspondence between the Council and the investigating officer followed.
30. Following a reconciliation exercise comparing all information potentially covered by the request against that already identified, and discussions with Councillor McCabe, the Council disclosed additional information to Councillor McCabe. It continued to withhold a small amount of information.

31. The Council accepted that all of Councillor McCabe's requests should have been handled under the EIRs. There is, however, no provision in the EIRs for a review being sought after the expiry of the period specified in regulation 16(2). Given the timing of Councillor McCabe's requirement for review in relation to request 1, the subsequent review could only be valid for the purposes of FOISA (and so the Commissioner could consider the handling of this request under FOISA only). The Council acknowledged this and confirmed that it was withholding information under section 33(1)(b) of FOISA
32. In relation to requests 2, 3 and 4, the Council confirmed that it wished to rely upon section 39(2) of FOISA. It also applied the exception in regulation 10(5)(e) of the EIRs to the small amount of information remaining withheld and covered by these requests, rather than the FOISA exemptions applied earlier. In addition, the Council continued to argue that request 3 was, to a substantial extent, a repeat of request 2. It would have been manifestly unreasonable to expect it to respond again, and so it considered it was entitled to apply regulation 10(4)(b) of the EIRs (rather than section 14(2) of FOISA) to the extent that the request was repeated.
33. Councillor McCabe acknowledged receipt of the information provided during the investigation, but wished the Commissioner to issue a decision on the matters raised. He expressed particular concern that information was disclosed only after the intervention of the Commissioner. He acknowledged that request 3, in part, covered information previously requested within request 2.

Commissioner's analysis and findings

34. 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 Councillor McCabe and the Council. She is satisfied that no matter of relevance has been overlooked.
35. In his correspondence with the Commissioner and the Council, Councillor McCabe made a number of submissions regarding his right to receive the information as a Councillor. These are not matters the Commissioner can comment on: her remit is confined to the Council's handling of the requests under FOISA and the EIRs, which relate to making information available to the public and not to particular individuals or classes of individuals.

FOISA or EIRs

36. The Council responded to all of Councillor McCabe's requests solely in terms of FOISA.
37. The relationship between FOISA and the EIRs is set out in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹ and need not repeat it in full here. However, it is relevant to reiterate some of the key points which are relevant in this decision:
 - The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition of environmental information in the EIRs.
 - There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200600654.aspx>

- Any request for environmental information therefore **must** be dealt with under the EIRs.
 - In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2), thereby removing the need to consider that request further in terms of FOISA.
38. Given the subject matter of the requests (all of which relate to a substantial urban regeneration project) and having considered the information identified by the Council in responding to them, the Commissioner is satisfied that any information falling within the scope of these requests would be environmental information, as defined in regulation 2(1) of the EIRs. She considers the information would fall within either paragraph (a) of the definition of environmental information contained in regulation 2(1) of the EIRs (as information on the state of the elements of the environment) or paragraph (c) of that definition (as information on measures affecting or likely to affect those elements).
39. As discussed above, the Commissioner cannot consider whether the Council complied with the EIRs in dealing with request 1. For this request, where the Council was entitled to exercise its discretion section 20(6) of FOISA and consider a late requirement for review, she will consider the application of section 33(1)(b) of FOISA below.
40. In providing its submissions to the Commissioner, the Council accepted that it should have considered each of the requests in terms of the EIRs. In relation to request 2, 3 and 4, the Council stated that it wished to rely upon section 39(2) of FOISA.

Section 39(2) of FOISA – environmental information

41. 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, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner considers the Council would have been entitled to apply the exemption to Councillor McCabe's requests, given her conclusion that it is properly classified as environmental information.
42. As there is a separate statutory right of access to environmental information available to the applicant, the Commissioner also considers that, in this case, the public interest in maintaining this exemption and in dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA. Therefore, the Commissioner will consider the Council's handling of the requests 2, 3 and 4 in terms of the EIRs only.

Regulation 5(1) of the EIRs

43. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. This obligation relates to information that is held by an authority when it receives a request.
44. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) of the EIRs, requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies.
45. Councillor McCabe made a number of requests for recorded information. The information he requested was environmental information, as discussed above, and as such fell to be considered under the EIRs.

46. In relation to requests 2, 3 and 4, therefore, the Commissioner therefore concludes that, in responding terms of FOISA only, the Council failed to identify the requests as requests for environmental information and thereby failed to comply with regulation 5(1).

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

47. In relation to request 2, the Council provided Councillor McCabe with further information during the investigation, in addition to that provided earlier.
48. Having considered the Council's submissions, the Commissioner finds that in responding to Councillor McCabe's request 2, the Council failed to identify and locate all of the information it held and which fell within the scope of the request. This was clearly a further failure to comply with regulation 5(1) of the EIRs and is indicative of inadequate consideration of the request and subsequent searches. Had these matters been addressed adequately in responding to the request, all relevant information should have been identified earlier, additional information might have been provided to the requester and considerable resources might have been saved by both the Council and the Commissioner.
49. The Commissioner accepts the Council's interpretation of each of the requests under consideration here and, having considered all relevant submissions and the terms of the requests, the Commissioner accepts that (by the close of the investigation) the Council had identified and located all of the information it held and which fell within the scope of Councillor McCabe's requests. By that time, following a reconciliation exercise which compared the information potentially covered by the requests against that identified earlier, only a very limited amount of information from the project file remained withheld under the EIRs (see below), all other information from the file having been given to him.
50. The Commissioner notes that there is a degree of overlap between the information requests and the information the Council continues to withhold. The Commissioner will therefore consider the application of regulation 10(5)(e) of the EIRs collectively in relation to requests 2,3 and 4.

Regulation 10(5)(e) of the EIRs

51. Regulation 10(5)(e) provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
52. As with all of the exceptions contained within regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). Even where the exception applies, the information must be released unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
53. The Aarhus Convention: an Implementation Guide² (which offers guidance on the interpretation of the Aarhus Convention, from which the EIRs are derived) notes (at page 88) that the first test for considering this exception is that national law must expressly protect the

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http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

confidentiality of the withheld information: it must, the guidance states, 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.

54. The application of regulation 10(5)(e) of the EIRs was fully considered in *Decision 033/2009 Mr Paul Drury and East Renfrewshire Council*³ and the Commissioner does not intend to repeat that consideration in detail here. There, the Commissioner concluded that, before regulation 10(5)(e) can be engaged, authorities must consider the following matters:

- Is the information commercial or industrial in nature?
- Does a legally binding duty of confidence exist in relation to the information?
- Is the information publicly available?
- 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?

55. The withheld information relates to the Council's Denny Regeneration Project and the redevelopment of the area in question, through competitive tendering and involving commercial developers. Consequently, the Commissioner is satisfied that the information is commercial in nature.

Does a legally binding duty of confidence exist in relation to the information?

56. The Council submitted that it was trying to protect its own legitimate economic interests and that the information was received under an implied obligation of confidentiality. It drew attention to *Decision 197/2011 Mr Alan Thomson and Perth and Kinross Council*⁴, where the Commissioner considered that such an expectation of confidentiality to be normal practice in circumstances of this kind. In this particular case, the Council submitted that the negotiations were still ongoing and the implied confidentiality continued.

57. Having considered the context within which the information was supplied to the Council, the Commissioner accepts that it was supplied subject to an implied obligation of confidence. Such an obligation may lapse with the passage of time but, in the circumstances of this particular case, the Commissioner accepts that the obligation of confidence (in relation to the information that the Council continues to withhold) remained in force at the time the Council responded to Councillor McCabe's requirements for review.

Is the information publicly available?

58. The Council submitted that the information remaining withheld was not currently in the public domain.

59. While noting that other elements of the requested information have been made publicly available, the Commissioner accepts that the information still withheld was not publicly available when the Council dealt with Councillor McCabe's requirement for review (nor, indeed, is it so available now).

³ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2009/200800429.aspx>

⁴ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2011/201101446.aspx>

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

60. As noted above, the term “legitimate economic interest” is not defined within the EIRs. The interest in question must, however, be financial, commercial or otherwise “economic” in nature, and the prejudice to that interest must be substantial. In order to apply this exception, an authority must, in the Commissioner’s view, be able to demonstrate that the harm to the economic interest in question would be real, actual and of significant substance.
61. The Council provided the Commissioner with further background to the regeneration project and explained why it considered the disclosure of the information would cause, or be likely to cause, substantial harm to the Council’s legitimate economic interest.
62. It explained that its concerns centred on the risk to the Council in not being able to get the best deal for the public purse and for the community of Denny, or being unable to negotiate a deal at all. It explained that this would cause further delay in the delivery of the regeneration project for Denny – again, a matter of key concern to the wider community.
63. The Council further explained that the developer was in negotiations with other retailers and disclosure of the information that remains withheld might lead to speculation and adversely prejudice the position of any of the parties involved in such negotiations. It highlighted concerns specific to the redevelopment and the area.
64. As mentioned above, the Commissioner has to be satisfied that the harm to the economic interest in question (and thus to the confidentiality to be protected) would be real, actual and of significant substance. Whilst the Commissioner cannot publish all of the submissions she has received from the Council, as to do so would involve reference to the information being withheld and other information which would be likely to prejudice the economic interests in question, she accepts the Council’s submissions as to the commercial sensitivity of the information that remains withheld. In reaching this conclusion, she has focused on the limited amount of information remaining withheld and its specific nature.
65. In all the circumstances, therefore, the Commissioner is satisfied that disclosure of the information would have caused, or would have been likely to cause, substantial harm to the ongoing legitimate economic interests of the Council. Therefore, the Council was entitled to withhold it under regulation 10(5)(e) of the EIRs.

Consideration of the public interest

66. Having upheld the use of the exception contained within regulation 10(5)(e), the Commissioner is required to consider the public interest test set out in regulation 10(1)(b) of the EIRs. 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.
67. The Council submitted that the public interest strongly favoured withholding the information, given the real and significant prejudice that might arise in either the loss of the project (which it stated had happened in the past) or other related loss to the public purse. The Council provided further explanation which, as discussed above, it would be inappropriate to reproduce here. It also highlighted the public interest in local authorities being able to obtain best value.
68. Councillor McCabe’s submissions to the Commissioner centred on his right to be provided the information as an elected member of the Council and the fact that critical information was

(in his view) purposely withheld from elected members. As mentioned above, this is not something the Commissioner can consider.

The Commissioner's view

69. The Commissioner recognises there is always a considerable public interest in Scottish public authorities being transparent and accountable for actions taken. There is a public interest in ensuring that projects of the kind under consideration here are completed effectively and with a view to obtaining best value, for the local community in particular and the public purse in general.
70. The Commissioner has already concluded that disclosure of this information would be likely to cause substantial harm to a legitimate economic interest, and making the information available (causing such harm) would not be in the public interest.
71. Equally, given the strong public interest in the maintenance of confidences and in fair competition, she is satisfied that there is a strong public interest in the information not being made public (which would be the effect of making it available under the EIRs). On balance, therefore, in all the circumstances of this case, she concludes that the public interest in making the information available is outweighed by the public interest in maintaining the exception in regulation 10(5)(e) of the EIRs.
72. The Commissioner therefore finds that the Council was entitled to withhold the remaining information under regulation 10(5)(e) of the EIRs.

Section 33(1)(b) of FOISA

73. As mentioned above, in relation to request 1 the Council submitted that it was withholding information under section 33(1)(b) of FOISA. This provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
74. There are a number of elements an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to establish:
 - a) whose commercial interests would (or would be likely to) be harmed by disclosure,
 - b) the nature of those commercial interests and
 - c) how those interests would (or would be likely to) be prejudiced substantially by disclosure.
75. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to be) harmed, it must make this clear. Generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.
76. The Commissioner notes that on 15 July 2015, in responding to Councillor McCabe's requirement for review, the Council informed Councillor McCabe that names and drawings submitted by two bidders were withheld under section 33(1)(b) of FOISA.
77. In providing submissions to the Commissioner, however, the Council acknowledged that the name and drawings submitted by one of the bidders had been made public on 9 June 2015. The Commissioner can only conclude, therefore, that in responding to Councillor McCabe's

requirement for review the Council was not entitled to rely upon section 33(1)(b) of FOISA to withhold this information.

78. During the investigation, the Council submitted that it wished to rely upon the submissions it made regarding regulation 10(5)(e) of the EIRs, as outlined above, to justify the withholding of the remaining information in terms of section 33(1)(b) of FOISA.
79. This is the same information as is considered above in relation to regulation 10(5)(e). The Commissioner has already concluded that the Council was entitled to rely upon regulation 10(5)(e) to withhold this information.
80. In causing the substantial prejudice required for regulation 10(5)(e) to apply, the Commissioner is satisfied that disclosure of the remaining withheld information would also cause, or be likely to cause, the substantial prejudice required for section 33(1)(b) of FOISA to apply. In this particular case (it does not follow that the same will apply in all cases), the Commissioner is satisfied that the submissions provided by the Council address all of the points set out in paragraph 74 above.
81. The Commissioner has also considered all relevant public interest arguments set out above in relation to regulation 10(5)(e) of the EIRs. She acknowledges that the same public interest considerations apply for the purposes of section 33(1)(b) of FOISA. In all the circumstances, therefore, she finds that the Council was justified in withholding the remaining information under section 33(1)(b) of FOISA.

Regulation 10(4)(b) of the EIRs

82. In relation to request 3, the Council maintained that there was a considerable overlap with request 2 and that, to that extent, the request was repeated. Having acknowledged that the request was for environmental information and therefore subject to the EIRs, the Council considered this information to be exempt under regulation 10(4)(b) of the EIRs.
83. Regulation 10(4)(b) provides that a Scottish public authority may refuse to make environmental information available to the extent that the request is manifestly unreasonable. Depending on the terms of the request, it might be argued that a request was manifestly unreasonable in part only.
84. The Council has argued that it would be manifestly unreasonable to respond to the request to the extent that it was repeated. Section 14(2) of FOISA makes provision for repeated requests. Regulation 10(4)(b) does not, specifically: it requires that the request be manifestly unreasonable. The EIRs do not contain a definition of the terms “manifestly unreasonable”, but the Commissioner has considered its meaning in her briefing on the exception⁵.
85. In submitting that the request was manifestly unreasonable, the Council appears to have relied entirely on the tests applicable to section 14(2) of FOISA. To the extent that it considered the request to be a repeat of request 2, it argued that the request was substantially similar to that earlier request and that a reasonable period had not elapsed between the making of the earlier and later requests.
86. In the Commissioner’s view, this is not enough. The inclusion of the word “manifestly” imports a high test, and the Commissioner cannot accept that it will be so plainly unreasonable to respond to any repeated request, regardless of its terms or the information captured by it. In simply repeating submissions made in relation to section 14(2) of FOISA,

⁵ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Section14Overview.aspx>

without any consideration of their application to regulation 10(4)(b), the Commissioner cannot accept that the Council has done enough to satisfy her that the exception would be applicable in the circumstances.

87. Given that the information concerned has either been provided to Councillor McCabe or withheld under another exception (which she has upheld), the Commissioner does not find it necessary to make any further findings in relation to request 2.

Decision

The Commissioner finds that Falkirk Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 in responding to the information requests made by Councillor McCabe.

The Commissioner finds that by failing to identify the information requests as requests for environmental information, and by failing to identify and locate all of the relevant information it held, the Council failed to comply with the EIRs, and in particular regulation 5(1).

The Commissioner also finds that the Council was not entitled to inform Councillor McCabe that some of the information requested was exempt from disclosure under section 33(1)(b) of FOISA. In doing so, it failed to comply with section 1(1) of FOISA.

However, the Commissioner finds that the Council was entitled to rely upon regulation 10(5)(e) of the EIRs and section 33(1)(b) of FOISA to withhold the information that remained withheld.

Given her conclusions, and the Council's disclosure of information during the investigation, the Commissioner does not require the Council to take any action in this case, in response to Councillor McCabe's application.

Appeal

Should either Councillor McCabe or Falkirk 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.

Margaret Keyse
Head of Enforcement

28 January 2016

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.

...

20 Requirement for review of refusal etc.

- (1) An applicant who is dissatisfied with the way in which a Scottish public authority has dealt with a request for information made under this Part of this Act may require the authority to review its actions and decisions in relation to that request.

...

- (5) Subject to subsection (6), a requirement for review must be made by not later than the fortieth working day after-

- (a) the expiry of the time allowed by or by virtue of section 10 for complying with the request; or

- (b) in a case where the authority purports under this Act-

- (i) to comply with a request for information; or

...

- (6) A Scottish public authority may comply with a requirement for review made after the expiry of the time allowed by subsection (5) for making such a requirement if it considers it appropriate to do so.

33 Commercial interests and the economy

(1) Information is exempt information if-

...

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

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.

...

(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;

...

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