

Decision Notice

Decision 244/2016: Cemex UK Operations Limited and the Scottish Ministers

Planning permission: Hyndford Quarry

Reference No: 201502152

Decision Date: 9 November 2016



Scottish Information
Commissioner

Summary

On 13 July 2015, the Scottish Ministers (the Ministers) were asked for information about planning permission for works at Hyndford Quarry, Lanark. The Ministers refused to disclose some internal communications.

The Commissioner accepted that the information was internal communications, but ordered the Ministers to disclose some of it on the basis that the public interest favoured disclosure. She also found that the Ministers had failed to give adequate advice and assistance to help understanding of the information they held.

Relevant statutory provisions

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a), (c) and (f) of definition of “environmental information”); 5(1) and (2)(b) (Duty to make available environmental information on request); 6(1)(b) (Form and format of information); 9(1) and (3) (Duty to provide advice and assistance); 10(1), (2) and (4)(e) (Exceptions from duty to make environmental information available); 16 (Review by Scottish public authority)

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 13 July 2015, solicitors acting on behalf of Cemex UK Operations Ltd (Cemex) made a request for information to the Ministers (subsequent references to Cemex in this decision include solicitors acting on their behalf). The request concerned an application by Cemex for planning permission to carry out works at Hyndford Quarry, Lanark, which had been called in by the Scottish Ministers. The request was for:
 - (i) all information provided by Scottish Government officials to the Scottish Ministers in connection with the Reporters’ report, including all information in any advice and reports, and all information in all drafts of any advice and reports provided to the Scottish Ministers;
 - (ii) all other information received by the Scottish Ministers which they took into account in reaching their decision on the planning application (excluding the Reporters’ report and the documents referred to in the report and the copy presentations provided to Cemex on disc by the Directorate for Planning and Environmental Appeals in January 2015); and
 - (iii) all information in any advice provided to the Scottish Ministers in connection with their decision as to whether to issue a direction under section 20 of the Town and Country Planning (Scotland) Act 1997 regarding the South Lanarkshire Development Plan.

Cemex stipulated that, for any information not considered to be “environmental information” within the meaning of the EIRs, the request should also be considered under FOISA. Where information was still in the course of completion, Cemex asked the Ministers to provide all information not in the course of completion, and the date by which the remaining information was expected to be completed.

2. Cemex received the Ministers’ response on 7 August 2015. The Ministers applied the exemption in section 39(2) of FOISA and responded under the EIRs, as they considered the information sought by Cemex to be environmental information. The Ministers withheld the information requested under regulation 10(4)(e) of the EIRs, informing Cemex that the information could not be disclosed as it comprised internal communications between Scottish Government officials and Scottish Ministers which were intended to inform deliberations. They outlined their consideration of the public interest test, which led them to conclude that the public interest favoured upholding the exception.
3. On 7 September 2015, Cemex wrote to the Ministers, requesting a review of their decision on the following basis:
 - (i) Acknowledging that part (i) of the request might comprise some internal communications, Cemex emphasised that parts (ii) and (iii) were expressly intended to capture information from other sources.
 - (ii) To the extent that any of the information was claimed to be internal communications but involved third parties, Cemex was not satisfied that the Ministers had evidenced the relationship between the communicating parties.
 - (iii) Cemex believed the Ministers had failed to conduct a full and proper assessment of the public interest test in relation to the application of the exception cited.
 - (iv) By withholding all the information falling within the scope of the request, Cemex was not satisfied that the Ministers had interpreted the exception cited in a restrictive manner, applying a presumption in favour of disclosure.
4. The Ministers notified Cemex of the outcome of their review on 30 September 2015, upholding their original decision with modification. For the majority of the information originally withheld, the Ministers maintained their reliance on regulation 10(4)(e). They reiterated their consideration of the public interest. The Ministers also informed Cemex that some of the information requested was publicly available, relying on regulation 6(1)(b) and providing Cemex with links to where that information could be accessed online.
5. On 16 November 2015, Cemex wrote to the Commissioner, applying 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. Cemex stated it was dissatisfied with the outcome of the Ministers’ review because, in its view:
 - (i) by failing to demonstrate the relationship between the communicating parties (where one of these was not the Ministers), the Ministers had failed to demonstrate that the exception had been properly applied;
 - (ii) the Ministers had failed to take full account of all relevant matters when considering the public interest; and

- (iii) in respect of parts (ii) and (iii) of its request, the Ministers had failed to identify whether any external information was held.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Cemex 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. On 4 December 2015, the Ministers were notified in writing that Cemex had made a valid application. They were asked to send the Commissioner the information withheld from Cemex. The Ministers provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and answer specific questions, including justifying their reliance on any provisions of FOISA or the EIRs they considered applicable to the information requested. The Ministers were also asked to confirm whether they held any relevant information from external sources, and to describe the searches carried out to establish what information they held.

Commissioner's analysis and findings

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

Background

10. The Ministers provided the Commissioner with some background information, explaining that Hyndford Quarry, which produces a range of sand and gravel products for the construction industry, was first granted planning permission in 1964. Cemex, which acquired the quarry in 2005, had submitted a planning application to South Lanarkshire Council (the Council) in November 2012 to extend the existing quarry to the south and west. Having considered the application in December 2013, the Council was minded to grant planning permission, subject to conditions and a planning obligation.
11. In January 2014, the Ministers called in the planning application for their own determination, in view of the proposed development's potential impact on the nearby New Lanark World Heritage Site. Consequently, Reporters from the Scottish Government Planning and Environmental Appeals Division were appointed to prepare a report and recommendations to the Ministers.
12. The Reporters' report of 20 February 2015 was submitted to the Ministers and, on 26 June 2015, the Ministers issued Cemex with a notice of intention to grant planning permission for the southern extension only, subject to appropriate planning obligations or conditions. The Reporters' report was published on the Ministers' website on 26 June 2015.
13. A supplementary Reporters' report on the outstanding matters was prepared and submitted to the Ministers on 16 November 2015. A second notice of intention to grant planning

permission for the southern extension only, subject to these conditions, was issued to Cemex by the Ministers on 9 February 2016.

14. The Ministers explained that, at the time of providing their submissions to the Commissioner, the planning obligation had not been completed or registered, and no decision notice had been released. Accordingly, the Ministers submitted that the planning application was still considered to be “live” and under consideration.

Application of the EIRs

15. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs. The information relates substantially to a planning application seeking permission for mineral extraction operations and associated restoration and enhancement works at Hyndford Quarry, located close to the New Lanark World Heritage Site. In reaching this conclusion, the Commissioner has considered the information in question, along with paragraphs (a), (c) and (f) of the definition of environmental information (reproduced in Appendix 1). Cemex has not disputed the Ministers’ decision to handle the request under the EIRs and the Commissioner will consider the information in what follows solely in terms of the EIRs.

Information held

16. 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 the authority when it receives a request.
17. 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) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).

Further response provided to Cemex

18. Following notification of Cemex’s application to the Commissioner, the Ministers wrote to Cemex on 23 December 2015, having given further consideration to their previous responses and some of the points raised in Cemex’s application to the Commissioner. The Ministers informed Cemex that:
 - (i) They now considered some of the withheld information could be disclosed. This comprised extracts from advice sent to the Cabinet Secretary for Social Justice, Communities and Pensioners’ Rights by the Planning Decisions team on 10 June 2015, and an email to the Cabinet Secretary from the Communications team dated 25 June 2015. The Ministers disclosed this information to Cemex, confirming that the remaining withheld information was still considered excepted from disclosure under regulation 10(4)(e) of the EIRs.
 - (ii) Their review outcome of 30 September 2015 ought to have included a further weblink to additional information that was publicly available. This was provided to Cemex. The Ministers informed Cemex that regulation 6(1)(b) applied to this information.
 - (iii) Some of the information in the advice to Ministers dated 10 June 2015 was also publicly available, as it either summarised the Reporters’ report or comprised documents referred to in the report. Noting that part (ii) of Cemex’s request suggested

this information was not being requested, the Ministers did not consider this information to fall within scope.

- (iv) All of the information falling within the scope of Cemex's request comprised information sent by Scottish Government officials to Ministers. The Ministers confirmed they held no external correspondence that would fall within the scope of part (ii) of the request.

The Ministers apologised to Cemex that some of these points had not been clarified earlier.

Searches

- 19. In order to ascertain whether all relevant information had been identified by the Ministers, they were asked to provide an explanation of the searches they had undertaken in order to identify, locate and retrieve that information.
- 20. The Ministers provided evidence of the searches and enquiries carried out. They explained that keyword searches of their Electronic Records Document Management System had been undertaken, providing the Commissioner with a list of the keywords used. These searches, the Ministers confirmed, identified the information falling within scope. The Ministers also provided details of searches of inboxes that had been carried out, confirming these had identified no further information relevant to the request.
- 21. In conclusion, the Ministers considered these searches were sufficient to identify any relevant information held.

External information – parts (ii) and (iii) of request

- 22. In its application to the Commissioner, Cemex was dissatisfied that the Ministers failed to identify whether they held any information from external sources falling within the scope of parts (ii) and (iii) of its request. Noting the Ministers' further response to Cemex dated 23 December 2015, the Ministers were asked to confirm whether they held any such information.
- 23. The Ministers acknowledged Cemex's concerns that additional relevant information from external sources might exist. However, they confirmed they held no correspondence from external sources falling within the scope of the request.

Commissioner's findings – information held

- 24. Having considered all the relevant submissions together with the withheld information, the Commissioner is satisfied that the Ministers took adequate and proportionate steps to establish what information they held and which fell within the scope of the request. She accepts, on balance, that any information relevant to the request was capable of being identified using the searches described by the Ministers.
- 25. The Commissioner has no locus to comment on whether more information should have been held by the Ministers. The question she must consider in this case is: was all the relevant information held by the Ministers located and considered appropriately under the EIRs? She is satisfied that it was.
- 26. The Commissioner is also satisfied that the Ministers held no correspondence from external sources falling within the scope of the request. She notes that, despite this matter being raised by Cemex in its request for review, the Ministers failed to inform Cemex (in their review outcome) that they held no such information. It was only after notification of Cemex's

application to the Commissioner that the Ministers addressed this point, and even then it was not entirely clear whether this related to the request in whole or in part.

27. The Commissioner acknowledges the Ministers' efforts to address Cemex's dissatisfaction in this regard early in the investigation, and notes they have apologised for not doing so earlier. However, by failing to inform Cemex, in the review outcome, that no correspondence from external sources was held, the Commissioner finds that the Ministers failed to comply fully with regulation 16 of the EIRs. She does not require the Ministers to take any action with regard to this failure.

Regulation (10)(4)(e) – internal communications

28. Under regulation 10(4)(e) of the EIRs, a 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 on and consider the public interest test (regulation 10(1)(b) of the EIRs).
29. As with all exceptions in regulation 10 of the EIRs, the Ministers are obliged to apply this exception restrictively and with a presumption in favour of disclosure (regulation 10(2)).
30. The Ministers submitted that information sent between Scottish Government officials and Ministers were internal documents for the purposes of deliberation on the planning decision. Confirming no relevant communications from third parties had been identified, the Ministers submitted they had appropriately applied regulation 10(4)(e) to the information held.
31. Having viewed the withheld information, which comprises correspondence between Scottish Government officials and Ministers, the Commissioner is satisfied it comprises internal communications and therefore is subject to the exception in regulation 10(4)(e).
32. The Commissioner will now go on to consider where the balance of public interest lies with regard to the disclosure of this information, as required by regulation 10(1)(b) of the EIRs.

Public interest test

33. In common with all the other exceptions in the EIRs, regulation 10(4)(e) is subject to the public interest test set out in regulation 10(1)(b). Consequently, information can be withheld under this exception only where, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

The Ministers' submissions

34. In their submissions to the Commissioner, the Ministers acknowledged the public interest in making available the advice provided to Ministers in this case, particularly given the topicality and high profile afforded to planning consents involving greenspace and heritage sites, and the impact on communities directly affected by the proposal.
35. The Ministers explained that the purpose of seeking a Reporters' report is to allow the gathering of evidence, both for and against a proposal, to allow Ministers to reach an informed conclusion. They submitted there is a standard practice in the holding and reporting of Public Local Inquiries and the Reporters' report is always published following Ministerial determination.
36. The Ministers argued that there was a strong public interest, in the interest of effective government, for decisions and judgements regarding significant infrastructure proposals to

be made on the basis of high quality advice and with full consideration of all available information. In order to facilitate full interpretation of the Reporters' report and to allow informed decisions to be reached, they believed that Ministers and officials must be able to supply and discuss advice and the issues arising concerning planning decisions.

37. The Ministers submitted that an environment in which full consideration could be given to differing opinions, without pressure from either side, was key to ensuring that an informed decision was reached, without fear of misinterpretation or misrepresentation caused by the early release of the advice under consideration.
38. On balance, the Ministers considered the public interest lay in ensuring that Ministers and officials were able to discuss and debate all available options in order to fully understand any resulting implications and reach a fully informed decision.
39. The investigating officer drew the Ministers' attention to the Commissioner's *Decision 231/2006 Mr Jim Thomson and the Scottish Executive*¹, which explored issues which appeared similar in many respects to those under consideration here. In that decision, the Commissioner was not persuaded by the arguments put forward by the Scottish Executive that disclosure of advice to Ministers in relation to a planning application would have the harmful effects claimed by the Executive. In that case, the Commissioner determined, given the nature and context of the advice and the specific circumstances of the case, that the balance of public interest favoured disclosure. The Ministers were asked to explain why they believed the case under consideration here was different from that in *Decision 231/2006*, specifically in relation to the withheld information in the advice provided to Ministers.
40. In response, the Ministers argued the cases were quite different, based on the following:
 - (i) The case under consideration here related to a live undetermined planning application, still under consideration by the Ministers, whereas the case in *Decision 231/2006* related to a matter which was no longer live at the time of the request.
 - (ii) The withheld information in each case was different and related to different stages in the planning process. The information in the current case related to advice on the Ministers' determination of a planning application, whereas the information in the case in *Decision 231/2006* related to advice on whether or not the Ministers should call in the planning application. They considered the former more sensitive.
 - (iii) The case in *Decision 231/2006* was considered under FOISA, whereas the current case was being considered under the EIRs.
 - (iv) The arguments in each case were quite different. In the case in *Decision 231/2006*, the Ministers argued that disclosure would substantially inhibit free and frank views and advice. In the current case, as the communications were internal and regulation 10(4)(e) applied, the decision to withhold the information was based on the public interest test. A key factor against disclosure was the need to protect the integrity of the decision-making process while the planning application was still under consideration.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2006/200600219.aspx>

41. The Ministers submitted that they must adhere to Section 8 of the Scottish Ministerial Code *Ministers' Engagement on Planning Matters*², which provides that Ministers involved in a planning decision must do nothing which might be seen as prejudicial to that process, particularly in advance of the decision being taken. This, the Ministers explained, ensured that the integrity of the decision was preserved from challenge in the Court of Session.
42. The Ministers stated that following *Decision 231/2006*, cognisance was taken of the Commissioner's comments that there was a high level of public interest in why certain planning decisions were taken. They went on to explain that, since 2007, assessments on notified applications have been routinely published online, thus informing the public why the Ministers either cleared or called in an application. Those assessments, the Ministers explained, were based on whether the proposal raised any issues of national interest and did not prejudice the outcome of the decision on the application.
43. The Ministers informed the Commissioner that, having re-examined the withheld information, they considered it possible that some further information could be disclosed, because it was either factual or now in the public domain.
44. On 16 June 2016, the Ministers disclosed further information to Cemex, confirming they considered that the remaining withheld information continued to be excepted from disclosure under regulation 10(4)(e) of the EIRs (and that the public interest continued to favour withholding it).

Cemex's submissions

45. In its submissions to the Commissioner, Cemex did not accept that the exception in regulation 10(4)(e) was properly applied, or that the public interest favoured upholding the exception. Cemex considered that the Ministers had failed to sufficiently detail the likely harmful consequences that would follow disclosure of the specific information falling within scope.
46. Cemex submitted there was a very strong argument favouring disclosure of the information. It believed members of the public in Lanark and South Lanarkshire had a particular interest in the transparency of public decisions affecting their local communities. As the planning application had generated a high level of interest within the local community, Cemex believed it was in the public interest to ensure that the Ministers had considered all relevant information appropriately in any decision-making process.

The Commissioner's views on the public interest

47. The Commissioner has considered carefully the submissions made by both the Ministers and Cemex.
48. The Commissioner recognises the significant public interest in transparency and accountability in relation to the decision-making process associated with planning applications, and therefore in ensuring these processes are open to effective public scrutiny. In this context, she notes the substantial amount of information concerning this planning application which has been made available, both to Cemex as a party and to the wider public through the Ministers' website. To an extent, this satisfies the public interest highlighted by Cemex.

² <http://www.gov.scot/Publications/2009/06/18095600/9>

49. In the particular circumstances of this case, the Commissioner acknowledges that there is weight to the Ministers' argument that protection should be afforded to the Ministers to allow full consideration of matters relating to planning applications, in an environment that allows for free and frank deliberations without influence from either party, with a view to reaching a fully informed decision. She must consider such questions in the circumstances prevailing at the time the Ministers considered the request, not at the time at which she is asked to make her decision.
50. The Commissioner has also carefully considered the remaining withheld information in this case, which concerns the advice provided to Ministers in June 2015 and the draft notice of intention letter and the annex attached thereto. She notes that this information was provided by the Planning Decisions team to the Ministers on 10 June 2015, after the Reporters' report was submitted in February 2015. Although she acknowledges that aspects of the planning application were still under consideration by the Ministers at the time of Cemex's request, the Commissioner notes that the Ministers had, effectively, reached a decision on the application by the time of the request, as evidenced by the notice of intention letter issued by the Ministers to Cemex on 26 June 2015.
51. Turning to the Ministers' reasons for distinguishing this case from that in *Decision 231/2006*, the Commissioner does not accept that the arguments in the two cases are quite different, as claimed by the Ministers. The regime, and thus the precise provisions applied by the Ministers, might be different in each case, but it is not apparent why this should have the radical effect on the principles applying to the decision-making process which the Ministers appear to be claiming.
52. Although the Commissioner accepts that the planning case under consideration here was notionally "live" at the time the Ministers dealt with Cemex's request and requirement for review, it is a matter of fact that the notice of intention letter had already been issued to Cemex by then. In effect, the advice under consideration here appears to have been acted upon and the Ministers had moved on from considering the principle of development to matters concerning how that development might be regulated in detail.
53. Further (with the exception of the draft notice of intention letter and the annex thereto), the Commissioner notes that the information contained within the advice from the Planning Decisions team dated 10 June 2015 is largely factual information, of a nature which any reasonably informed person would expect to be documented. In addition, the Commissioner notes that the substance of the majority of the information being withheld was already in the public domain, contained in the Reporters' report dated February 2015 (and published in June of that year).
54. The Commissioner notes, and welcomes, the fact that the Ministers have already disclosed some extracts of this advice to Cemex during the course of the investigation.
55. The Commissioner appreciates there is always a general public interest in making information held by public authorities accessible, to enhance scrutiny of the decision-making process and thereby improve accountability and participation. She also acknowledges a more specific public interest to allow scrutiny of the matters considered by the Ministers in reaching their decision in this case. Noting that the Ministers' decision in this case did not fully adopt the recommendations in the Reporters' report of February 2015, the matters considered by the Ministers in this case would appear to be the legitimate subject of public scrutiny and debate in a transparent democratic society.

56. The Commissioner acknowledges that the planning application was still “live”, but it is a matter of fact that the process had moved on to a different phase. Given this particular planning application was one of significant importance, not only to the communities on which it would impact but also in relation to its effect on the nearby World Heritage Site, the Commissioner considers there is strong public interest in disclosure of the advice under consideration.
57. Having considered the Ministers’ submissions in this case, the Commissioner considers that the arguments put forward by the Ministers are unsubstantiated and hypothetical, with no supporting evidence. The Ministers have submitted that disclosure of the information would inhibit their ability to reach a determination without prejudice when considering a planning application and that, in their view, such inhibition would not be in the public interest. In the Commissioner’s view, the question the Ministers ought to have concentrated on was what impact disclosure of this particular (largely factual) information could have on the decision-making process in this particular context. On the basis of the submissions provided, the Commissioner is not persuaded that the inhibition envisaged was likely to occur or was substantial, particularly bearing in mind that the advice in question had been acted upon by the time of Cemex’s request.
58. The Commissioner has taken into account the terms of regulation 10(2)(b) of the EIRs, which provides that a Scottish public authority shall apply a presumption in favour of disclosure. She has considered carefully the submissions made by both parties, the withheld information itself and the timing of the request. Having done so, she is satisfied that the public interest in disclosing the information in the advice to Ministers was not outweighed by that in maintaining the exception in regulation 10(4)(e). Consequently, she finds that the Ministers were not entitled to withhold the information in the advice dated 10 June 2015, to which they applied regulation 10(4)(e) of the EIRs.
59. Turning to the draft notice of intention letter and annex thereto, the Commissioner accepts that there is a public interest in allowing public authorities to prepare drafts of documents, based on the knowledge and circumstances prevailing at that particular time, safe in the knowledge that such drafts will not be put into the public domain, unless there is an overwhelming public interest favouring disclosure.
60. The Commissioner notes that the draft notice of intention letter and annex thereto differed from that issued to Cemex by the Ministers on 26 June 2015. However, having considered its content, she is not satisfied that disclosure of this draft documentation would add significantly to the public interest in allowing Cemex to understand the reasons for the decision taken by the Ministers, considering the extent to which that would be achieved by disclosure of the Ministerial advice, taken with the information in the public domain already.
61. In respect of these drafts, therefore, the Commissioner finds that the public interest in disclosing this information is outweighed by that in maintaining the exception in regulation 10(4)(e). She therefore finds that the Ministers were correct to withhold the information in terms of regulation 10(4)(e) of the EIRs.
62. Consequently, the Commissioner requires the Ministers to disclose to Cemex all of the remaining withheld information in the advice to Ministers dated 10 June 2015, but not that in the draft notice of intention letter and the annex thereto.

Advice and Assistance – Regulation 9(1)

63. Regulation 9(1) of the EIRs provides that a Scottish public authority must, so far as it would be reasonable to expect it to do so, provide advice and assistance to applicants and potential applicants. Regulation 9(3) provides that a Scottish public authority which conforms with the relevant Code of Practice (in relation to the provision of advice or assistance) is to be taken to have complied with this duty.
64. The Scottish Ministers' Code of Practice on the discharge of functions by Scottish Public Authorities under FOISA and the EIRs (the Section 60 Code³) states (at paragraph 5.1 in Part 2):
- Authorities should offer advice and assistance at all stages of a request***
Authorities have a duty to provide advice and assistance at all stages of a request. It can be given either before a request is made, or to clarify what information an applicant wants after a request has been made, whilst the authority is handling the request, or after it has responded.
65. The full text of Section 5 gives more detailed guidance on good practice in offering advice and assistance in relation to various stages and aspects of a request.
66. In its application to the Commissioner, Cemex submitted that, in relying on the exception in regulation 10(4)(e) of the EIRs for communications with third parties, the Ministers had failed to demonstrate the relationship between the communicating parties.
67. The Ministers were asked to comment on what advice and assistance was given to Cemex, to help it understand the Ministers' responses on this point.
68. The Ministers submitted that, in their original response to Cemex, they had explained that regulation 10(4)(e) applied "because the information is internal communications between Scottish Government officials and Scottish Ministers", and that this statement had been supported by a further detailed explanation in their review response.
69. The Ministers argued that it was widely known, and should especially be known by a firm of solicitors such as those representing Cemex, that officials and Ministers are all part of the organisation known as the Scottish Government, and so it should be obvious that communications between them are internal. The Ministers submitted there was nothing in Cemex's correspondence with them to suggest any misunderstanding or non-acceptance of this point.
70. In their submissions, the Ministers considered they had provided appropriate advice and assistance with regard to the information held. They believed the request from Cemex was clear in that part (i) specifically sought internal communications and the Ministers had informed Cemex that internal discussions were excepted from disclosure under regulation 10(4)(e) of the EIRs. For parts (ii) and (iii), the Ministers argued they had informed Cemex that no externally provided information was held, except for information already in the public domain.
71. In conclusion, the Ministers did not see what further advice and assistance they could reasonably have been expected to provide.

³ <http://www.gov.scot/About/Information/FOI/Section60Code/s60codeofpractice>

The Commissioner's views – advice and assistance

72. The Commissioner understands Cemex's dissatisfaction in being provided with a response and review outcome which referred to internal communications only, without adequate explanation of which parts of the request these related to and which failed to clarify that no correspondence from external sources was held.
73. The Commissioner can see that the Ministers' further response of 23 December 2015 was an effort to provide helpful information, but on this occasion she is of the view that the Ministers actions fell short of providing effective, reasonable advice and assistance, despite the underlying intentions.
74. The Commissioner considers it would have been helpful had the Ministers made it clear to Cemex which parts of the request the information identified as falling within scope related to, with an explanation of why that information was considered to be internal communications, rather than assuming Cemex "would know". The Ministers' point about the different constituent parts of the Scottish Government might have some relevance if the request was clearly for internal communications only, but it appears clear to the Commissioner (as Cemex made clear in seeking a review) that parts (ii) and (iii) were intended to include information received from elsewhere – if there was none, it fell to the Ministers to explain that.
75. In the circumstances narrated above, the Commissioner finds that the Ministers failed to meet their obligation to advise and assist Cemex, by providing it with the necessary information to allow it to fully understand the Ministers' responses and the information identified as falling within scope. In this respect, she finds that the Ministers failed to comply with regulation 9(1) of the EIRs.
76. The Commissioner recognises the Ministers took steps in an effort to address these shortcomings. Given the explanations outlined in this decision, the Commissioner does not require the Ministers to take any action with regard to this failure.

Decision

The Commissioner finds that, in the respects specified in the application to the Commissioner, the Scottish Ministers (the Ministers) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Cemex UK Operations Limited (Cemex).

The Commissioner finds that the Ministers failed to comply with the EIRs by incorrectly withholding information (the advice to the Ministers, insofar as remaining withheld) under regulation 10(4)(e) of the EIRs. Other information was correctly withheld under that exception.

The Commissioner also finds that the Ministers failed to inform Cemex adequately that they held no information from external sources, and so failed to comply with regulations 9(1) and 16 of the EIRs.

The Commissioner therefore requires the Ministers to provide Cemex with the information incorrectly withheld by **28 December 2016**.

Appeal

Should either Cemex UK Operations Limited or the Scottish Ministers 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 Scottish Ministers (the Ministers) fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Ministers have failed to comply. The Court has the right to inquire into the matter and may deal with the Ministers as if they had committed a contempt of court.

Margaret Keyse
Head of Enforcement

9 November 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.

...

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.

....

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

...

(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;

...

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

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.

...

6 Form and format of information

(1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-

...

(b) the information is already publicly available and easily accessible to the applicant in another form or format.

...

9 Duty to provide advice and assistance

- (1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.
...
- (3) To the extent that a Scottish public authority conforms to a code of practice under regulation 18 in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with the duty imposed by paragraph (1) in relation to that case.
...

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.
...

16 Review by Scottish public authority

- (1) Subject to paragraph (2), an applicant may make representations to a Scottish public authority if it appears to the applicant that the authority has not complied with any requirement of these Regulations in relation to the applicant's request.
- (2) Representations under paragraph (1) shall be made in writing to the Scottish public authority no later than 40 working days after either the date that the applicant receives any decision or notification which the applicant believes does not comply with these Regulations or the date by which such a decision or notification should have been made, or any other action should have been taken, by the authority but was not made or taken.
- (3) The Scottish public authority shall on receipt of such representations–
 - (a) consider them and any supporting evidence produced by the applicant; and

- (b) review the matter and decide whether it has complied with these Regulations.
- (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.
- (5) Where the Scottish public authority decides that it has not complied with its duty under these Regulations, it shall immediately take steps to remedy the breach of duty.

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