

Decision Notice

Decision 151/2018: Mr E and the Scottish Ministers

Wind farm applications

Reference No: 201801019

Decision Date: 3 October 2018



Scottish Information
Commissioner

Summary

The Ministers were asked for information relating to Kype Muir Wind Farm and Kype Muir Wind Farm Extension. The Ministers provided some information, explaining that other information, which had been removed from their website, was only held at the Scottish Government Library.

During the investigation, the Ministers notified the Commissioner that they held the information previously removed from their website, which had been republished. The Commissioner found that the Ministers had failed to make the information available in accordance with the EIRs.

The Commissioner was satisfied that, by the end of the investigation, all of the relevant information had been made available.

Relevant statutory provisions

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

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

Background

1. On 22 June 2017, Mr E made a request for information to the Scottish Ministers, Energy Consents Unit (the Ministers). Mr E made reference to an earlier response he had received regarding both Kype Muir Wind Farm and Kype Muir Wind Farm Extension (both being subject to the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2000 (the EIA)) and asked for:
 - a) Any scoping determination, and the associated scoping application, prepared under the EIA for these developments.
 - b) Any transport assessment prepared for these developments.
 - c) The agreed transport or traffic management plan for these developments.
 - d) The name of the agencies involved in preparing and agreeing the traffic management plan.
 - e) The developer summary of its community engagement submitted for the Ministers' consideration.
 - f) Details of any community engagement you, as the determining authority, undertook.
2. The Ministers responded on 5 July 2017. The Ministers advised, in terms of regulation 10(4)(a) of the EIRs, that they did not hold the information requested. They advised that the information had been available during the respective application processes on South Lanarkshire Council's planning portal, the Scottish Government Library and other locations, in accordance with the EIA publicity requirements. They stated that they (the Energy

Consents Unit) removed application material from their website and destroyed any hard copy documentation, three months after a determination had been published.

3. The Ministers did, however, provide Mr E with transport assessments for part b) of request and referred him to the Energy Consents website, where information relative to parts c) and d) of the request could be found. They confirmed they no longer held information falling within part e) of his request, and that (as no community engagement had been carried out) they did not hold information falling within the scope of part f).
4. On 14 August 2017, Mr E wrote to the Ministers, requesting a review of their decision on the basis that he was unhappy with the Ministers' inability to provide the information: he did not consider the policy of deleting information to be reasonable. He accepted the destruction of paper copies, as storage might be an issue, but stated that such an argument was not credible for the storage of electronic copies.
5. The Ministers notified Mr E of the outcome of their review on 11 September 2017. The Ministers confirmed the initial response to parts a) to d) of his request. In relation to part e), they advised that while the information had been removed from the Energy Consents Unit website, the documents were retained in the Scottish Government Library to allow public access. They advised Mr E that if he wished to view the information held in the Scottish Government Library, he should contact a named individual, and provided him with their contact details. In relation to part f) of the request, the Ministers provided a list of Community Councils who had been notified of the development proposals.
6. On 9 January 2018, Mr E wrote to the Commissioner. He stated that he wished the Commissioner to intervene regarding the Ministers' policy of removing and destroying environmental information for energy consents after three months. He later commented that the policy was contrary to the spirit of the EIRs and the policy of open government.
7. On 13 March 2018, the Commissioner wrote to the Ministers, drawing their attention to Mr E's dissatisfaction with their policy of deleting information. While the policy itself is not a breach of the EIRs, the Ministers were asked to give consideration to whether the policy complied with the Aarhus Convention (from which the EIRs are derived) and in particular, Article 1 and 7, which relate to access to and dissemination of environmental information.
8. The Ministers responded on 11 April 2018. They explained to the Commissioner why information was removed from the website 12 weeks after the relevant determination. They also explained that all of the previously uploaded information, and now unpublished information relating to a determined application, could be re-published on the website at any time should the information be requested. They apologised that the correspondence to Mr E did not make it clear that the expression "free up space" related to the destruction of hard copies only and not electronic space on the website.
9. The Ministers confirmed that they did not routinely destroy information previously held on their website in relation to such applications, and that they met their obligations under the Aarhus Convention. The Ministers advised that they would examine the feasibility of retaining all application information on their website for a period longer than 12 weeks.
10. On 12 June 2018, having been informed of the Ministers' submissions that information could be re-published if needed, Mr E wrote to the Commissioner's office. He applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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. Mr E stated he was dissatisfied with the outcome of the Ministers' review because he now believed the Ministers did hold the information requested, in electronic form, and that they should have provided that information rather than directing him to the Scottish Government Library or other parties.

Investigation

11. The application was accepted as valid. The Commissioner confirmed that Mr E made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to him for a decision.
12. On 24 July 2018, the Ministers were notified in writing that Mr E had made a valid application. The Ministers were advised that while the application had been made outwith the six month period allowed by section 47(4)(a) of FOISA, the Commissioner had exercised his discretion under section 47(5) of FOISA as, in his opinion, it was appropriate to consider Mr E's application. The case was allocated to an investigating officer.
13. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 27 August 2018, the Ministers were invited to comment on this application and answer specific questions, focusing on the steps taken to identify and locate any relevant information.
14. The Ministers provided submissions to the Commissioner to the effect that the information that had been held electronically, having been removed from the Energy Consents Unit website, had been republished on the website on 7 August 2018 and was now available to the public, including Mr E. They explained that this related to the Extension application only and not the original one (see below) and provided information on searches undertaken.
15. On 19 September 2018, the Ministers wrote to Mr E and advised him that, following review of their procedures, documentation would now remain published for a period of seven years following the determination (30 years for the determination letter). They confirmed that the information held in relation to the Kype Wind Farm Extension had been republished and was available on the website. They also advised that they had located other information relating to community engagement and provided this information. The Ministers apologised for not advising Mr E of the republication of the information sooner.
16. Mr E confirmed he had received the further correspondence from the Ministers, and acknowledged that the remaining information had been republished on the website, but wished the Commissioner to come to a decision on their handling of his request. He still believed the information had been held when he asked for it.

Commissioner's analysis and findings

17. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both Mr E and the Ministers. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

18. It is clear from the Ministers' correspondence with both Mr E and the Commissioner, and from the information itself, that the information sought by Mr E is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. It relates to the development of a specific wind farm and a subsequent application for its extension, and so

the Commissioner is satisfied that it falls within either paragraph (a) or paragraph (c) of the definition in regulation 2(1) (the text of each paragraph is reproduced in Appendix 1). Mr E has not disputed this and the Commissioner will consider the information in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs

19. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold, but which is not in fact held.
20. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.
21. Regulation 10(4)(a) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received. In responding to Mr E, this was the basis on which the Ministers approached the request.
22. In his application to the Commissioner, Mr E refused to accept that the Ministers did not hold the information removed from the Energy Consents Unit website, as the Ministers had stated in their response, and argued that they should have provided that information rather than directing him to the Scottish Government Library or to other parties.
23. During the investigation, the Ministers provided full submissions on the steps taken to identify and locate information falling within the scope of Mr E's request. They described the searches carried out, in electronic and paper records, to establish what relevant information they held, providing evidence of the outcome of these searches.
24. They explained that the original application for Kype Muir Wind Farm predated the introduction of their case management system in 2015. They advised that as the application was received on 1 August 2011 and consented on 21 May 2014, there was only limited information (the decision letter and associated documents) transposed into the system for uploading onto the website.
25. By contrast, the Ministers submitted that the application for Kype Muir Wind Farm Extension was received on 2 October 2014 and consented on 16 September 2016. They explained that when the case management system was introduced during 2015, live applications were input in their entirety, which was why far more information is available online in relation to the Extension application.
26. The Ministers confirmed that following the exchange with the Commissioner's office regarding the policy of removing information from the website, they arranged for the information stored in their case management system relating to Kype Muir Wind Farm and Kype Muir Wind Farm Extension to be republished on the Energy Consents Unit website.
27. The Commissioner notes that in the initial response, Mr E was advised that the information removed from the Energy Consents Unit website and was not held by the Ministers. They went on to advise that the information was available from the Scottish Government Library,

which in itself is contradictory (as information held in the Library will be held by the Scottish Ministers).

28. The review outcome of 11 September 2018 informed Mr E that following removal of the information from the website it continued to be held by the Scottish Government Library.
29. This review outcome gave no indication that the information was held at the Scottish Government Library other than on an “inspection only” basis. While the review outcome has to be taken as the Ministers accepting that the information was held in the Library (and therefore was held by the Ministers), it does not confirm, as is now known, that the information held electronically continued to be held in their case management system, available to be republished on their website.
30. The Commissioner further notes that while the information may have been available in the Scottish Government Library, the Ministers made no submissions as to how its presence there fulfilled Mr E’s request. In the review outcome, the Ministers simply advised that he would have to contact an individual at the Library in order to view the information. In the absence of any submissions as to how this met the requirements of the EIRs in terms of making information available to Mr E, its presence there is not something the Commissioner can consider further for the purposes of this decision.
31. Having considered all relevant submissions and the terms of the request, the Commissioner accepts that (by the close of the investigation) the Ministers had carried out adequate, proportionate searches to ascertain whether any relevant information was held. He is also satisfied that the information located during the investigation has now been made available to Mr E.
32. However, given that the information now republished was held on the Scottish Government case management system at the time of Mr E’s request, it is evident that the Ministers did not take adequate steps to identify and locate all relevant information in dealing with Mr E’s information request and requirement for review and that the exception in regulation 10(4)(a) did not apply. Given that the Ministers held the information and failed to provide it to Mr E in response to his request, the Commissioner finds that the Ministers failed to comply with regulation 5(1) of the EIRs.
33. The Commissioner is, however, pleased to note that the Ministers have reviewed their policy of removing information from the Energy Consents Unit website 12 weeks after the determination has been made, and that such information will now remain published for a period of seven years (and longer, in the case of the determination letter) following such determination.

Decision

The Commissioner finds that the Scottish Ministers failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr E.

The Ministers wrongly advised Mr E that the information was only held in the Scottish Government Library, and by doing so, the Commissioner finds that the Ministers failed to comply with regulation 5(1) of the EIRs in responding to the request.

Given that the information held has now been made available to Mr E, the Commissioner does not require the Ministers to take any action regarding this failure, in response to Mr E's application.

Appeal

Should either Mr E or the 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.

Margaret Keyse
Head of Enforcement

3 October 2018

Appendix 1 Relevant statutory provisions

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

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(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.

...

10 Exceptions from duty to make environmental information available–

...

(4) A Scottish public authority may refuse to make environmental information available to the extent that

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

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