

Decision Notice



Decision 063/2013 Zurich Insurance plc and South Lanarkshire Council

Flooding on the Earnock Burn

Reference No: 201202049
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www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

On 17 February 2012, Zurich Insurance plc (Zurich) asked South Lanarkshire Council (the Council) for a wide range of information regarding flooding on the Earnock Burn. The Council informed Zurich that its request was manifestly unreasonable and a response would not be provided.

Following an investigation, the Commissioner found that the Council was entitled to withhold the information under regulation 10(4)(b) of the EIRs. She did not require the Council to take any action.

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) (definitions (a) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (4)(b) (Exceptions from duty to make environmental information available)

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

Background

1. On 17 February 2012, Zurich's legal representatives asked the Council on behalf of Zurich for the following information (excluding information it had previously supplied):
 - a) Copies of all records/reports of flooding events on the upper Earnock Burn between 2003 and 2011.
 - b) Copies of all correspondence, emails, internal memos held by the council with regard to flooding of the upper Earnock Burn covering the period 2000 to 2011, except for those prepared in contemplation of, or in relation to, litigation.
 - c) Copies of any estimates, tenders, invoices, instructions, timesheets, correspondence with occupiers of land, or other documents held by the Council showing the steps taken by the Council (a) to install flood level or flow monitoring equipment, or (b) to install or implement any other flood mitigation/prevention works on the Earnock Burn in the general vicinity of



Durisdeer Drive, Hamilton culvert (HA/0077), culvert HA/0076, Lady Watson Gardens, Hamilton culvert and Woodfoot Road culvert and covering the period between 2005 and 2011.

- d) All records held by the Council of inspections including timesheets, instructions issued for inspection, and photographs taken during inspections, relating to performance by the council of its statutory duties under the Flood Prevention (Scotland) Act 1961, or any other flood prevention legislation, of the Earnock Burn from the area around Durisdeer Drive culvert (HA/0077) to Lady Watson Gardens culvert and to Woodfoot Road culvert, covering the period 2005 to 2011.
 - e) Any records, correspondence, reports or emails held by the Council commenting on the effectiveness of any maintenance or flood mitigation works in the vicinity of the said Durisdeer Drive, Lady Watson Gardens and Woodfoot Road culverts on the Earnock Burn, covering the period 2005 to 2011, except for those prepared in contemplation of, or in relation to, litigation.
 - f) Any correspondence, reports or emails held by the Council disclosing reasons why urgent flood mitigation works (temporary or otherwise) were not undertaken in the vicinity of the said Durisdeer Drive, Lady Watson Gardens and Woodfoot Road culverts on the Earnock Burn following the initial November 2006 flooding event, except for those prepared in contemplation of, or in relation to, litigation.
 - g) Copy of scoping correspondence, instructions or emails held by the Council and addressed to Halcrow (or any other engineers) from the Council regarding the commissioning of the various flooding assessments in relation to Earnock Burn covering the period from November 2006 to date, except for those prepared in contemplation of, or in relation to, litigation.
2. In this decision, all future references to correspondence with Zurich should be understood to refer to correspondence with Zurich's legal representatives.
 3. The Council responded on 19 March 2012, but refused to make the information available. It stated that providing all the information requested would put a burden on the Council in terms of the costs and resources involved in dealing with the request. It would also have an unreasonable impact on the service provided to the public. The Council considered the request to be manifestly unreasonable in line with regulation 10(4)(b) of the EIRs.
 4. On 1 May 2012, Zurich requested a review of the Council's decision. Zurich did not accept that the request was unreasonable or manifestly unreasonable and argued that any authority with adequate organisational arrangements in place ought to have no difficulty supplying the information requested.
 5. The Council notified Zurich of the outcome of its review on 1 June 2012. Having considered the request again, the Council reached the same conclusion and provided reasons to support its view that the request was manifestly unreasonable.



6. On 9 October 2012, Zurich faxed the Commissioner, stating that it was dissatisfied with the outcome of the Council's review and applying 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 certain specified modifications.
7. The application was validated by establishing that Zurich had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

8. On 23 October 2012, the Council was notified in writing that an application had been received from Zurich. The Council was invited to comment on the application (as required by section 49(3)(a) of FOISA) and asked to respond to specific questions. The Council was asked to justify its reliance on any provisions of the EIRs it considered applicable to the information requested.
9. The Council responded on 5 December 2012, explaining why it considered the request to be burdensome and therefore manifestly unreasonable. The Council was asked to provide additional information about the burden that would be created if it provided the information requested by Zurich. The Council provided this additional submission on 9 January 2013.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to her by both Zurich and the Council and is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

11. It is clear from the Council's correspondence with both Zurich and the Commissioner that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The requested information relates to flooding of the Earnock Burn, encompassing historical information, correspondence and maintenance. The Commissioner is satisfied that it 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).



Section 39(2) of FOISA – environmental information

12. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined in regulation 2(1)) 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 accepts that the Council was entitled to apply the exemption to the withheld information, given her conclusion that it is properly classified as environmental information.
13. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that 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.

Regulation 10(4)(b) - manifestly unreasonable

14. Under regulation 10(4)(b) of the EIRs, a Scottish public authority may refuse to make environmental information available if the request is manifestly unreasonable. The Council considers the request to be manifestly unreasonable due to the significant burden (in relation to the cost and diversion of resources) that would be placed on the Council if it were to provide the information requested.
15. There is no definition of “manifestly unreasonable” in the EIRs, or in Directive 2003/4/EC from which they are derived. There is no single test for what sort of request may be manifestly unreasonable. Rather, it is to be judged on each individual request, bearing in mind all of the circumstances of the case. Generally, in applying this exception, the Commissioner is likely to take into account the same kinds of considerations as she would in reaching a decision as to whether a request is vexatious, in terms of section 14(1) of FOISA.
16. As with a “vexatious” request, there may be circumstances where the burden of responding alone justifies deeming a request to be “manifestly unreasonable”. Unlike FOISA, there is no cost limit on complying with a request for environmental information, but there may be cases where the time and expense involved in complying with a request for environmental information means that any reasonable person would regard them as excessive.
17. Although the cost limit prescribed by the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 may be a useful starting point in considering the application of regulation 10(4)(b), the fact that a similar request may be rejected under the provisions of section 12 of FOISA is just one factor to consider and does not, in itself, render a request made under the EIRs manifestly unreasonable. It should be borne in mind that, in terms of regulation 8, there are circumstances in which an authority can charge any reasonable fee for the provision of environmental information.



18. There are other important factors which should be taken into consideration before concluding that environmental information can be withheld under regulation 10(4)(b). These include whether complying with the request would cause a disproportionate burden in terms of the workload involved, taking into consideration the size and resources of the public authority; the presumption in favour of disclosure in regulation 10(2)(b); the requirement to interpret exceptions restrictively (in regulation 10(2)(a)); and any other relevant circumstances particular to the case.

Zurich's submissions

19. Zurich explained that it has insured properties in the area of the Earnock Burn, which had flooded in 2006, 2008 and 2009, resulting in excessive financial compensation. Zurich considered that in terms of the Flood Prevention (Scotland) Act 1961, the Council has statutory duties to survey and maintain watercourses in the area to reduce the likelihood of flooding. (The 1961 Act was repealed in full by the Flood Risk Management (Scotland) Act 2009, but the Commissioner is aware that the 2009 Act gives local authorities duties in relation to flood risk management.)
20. Zurich explained that in 2011 it submitted a seven part request to the Council for flooding information in the area, and on that occasion the Council had provided the requested information, on payment of a fee. A report disclosed by the Council stated that measures should be taken to prevent flooding in the area. Having considered the disclosed information, Zurich concluded that further information was required to assess whether the Council had dealt with the flooding problems as identified in the disclosed report, and this resulted in its request of February 2012.
21. Zurich commented that, in line with regulation 4 of the EIRs, the Council has a duty to organise and keep environmental information relating to its functions, and therefore the information it had requested should be readily accessible. Zurich stated that if the information was not readily accessible, the Council was failing to take suitable organisational measures for the storage of environmental information.
22. Zurich added that, when providing information previously, the Council had incurred less expense than predicted and had refunded some of the monies paid. Zurich queried why the Council could not act similarly in this instance.

Council's submissions

23. The Council acknowledged that it had disclosed information to Zurich in the past, and had either charged a fee for doing so or provided it free of charge. However, in dealing with the previous request, the Council had ascertained what was involved and the impact that this work had had on the Council's other statutory responsibilities and obligations. This was the reason it had adopted a different approach to the request currently under consideration. The Council noted that the current request for information far exceeded the scale of the previous information request.



24. During the investigation, the Council was asked to provide a cost estimate for the work involved. The Council reiterated that it was difficult to quantify the specific number of documents associated with the request. However, to assist the Commissioner in understanding the work involved, the Council looked at one of the sites on the Earnock Burn, and noted that it took two minutes to retrieve 965 relevant records from its database. The Council stated that it would take 30 minutes to print these records and 965 minutes (one minute per record) to review each record. The Council advised that this site was just one of more than 20 similar flooding sites on the watercourse, and the figure of 965 records excluded any site photographs or supplementary reports associated with a site visit, maintenance works or improvement works which may or may not be available within other systems.
25. The Council went on to explain that the requested information is held in four separate locations, which would increase the time required to retrieve all the relevant information. The Council also explained why technical staff would have to complete the work as opposed to administrative staff whose hourly rate would be significantly less.
26. The Council reiterated that it was difficult to calculate the costs that would be incurred in complying with the request, but it had estimated that the costs of provision would equate to £9,789.65, of which £8,949.15 would be staff costs. The Council stressed again that the cost associated with providing the information was not the primary reason for refusal and that the Council was not seeking to charge a fee at this time.
27. The Council explained that its key concern was the burden that would be placed on its Flood Risk Management team, if the information covered by the request was to be retrieved and provided. All six members of the team had been involved with the Earnock Burn over the years, and all would be required to input into fulfilling the request. One individual from another small team would also be required to work on the request. Removing these officers from these teams to respond to the information request would mean that essential legislative and operational duties would be compromised with resulting implications.
28. The Council provided a list of the numerous responsibilities under the Flood Risk Management (Scotland) Act 2009 that the team had to attend to in addition to other routine work. It explained that the increasing frequency and seriousness of flooding events means that officers are required to respond to emergency incidents and manage the follow up situation. Removing officers from these duties to respond to this information request would mean that these essential legislative and operational duties would be compromised, with resulting implications.
29. In summary, the Council's view was that it would be manifestly unreasonable to deal with the request due to the significant burden this would place upon the service concerned, because of the number of records covered by the request. Providing the information would divert resources from a small team and which would compromise the essential legislative and operational activities that the team undertakes, impacting adversely on the residents and businesses of South Lanarkshire.



Commissioner's conclusions

30. The Commissioner acknowledges that, in common with all other Scottish public authorities, the Council has many demands on its time and resources, in addition to complying with requests for information under FOISA and the EIRs. Compliance with such requests should, however, be considered as an element of the authority's core business, being a statutory requirement. The Commissioner will not accept lightly arguments that compliance, in any given case, represents an unreasonable diversion from compliance with other core responsibilities.
31. The Commissioner notes that Zurich is a large company and is likely to have the funds to pay the estimated cost of complying with its request, although this would be beyond the means of many applicants. However, as noted above, the key issue in this case is not the level of the estimated costs, but whether the Council is required to comply with the request, regardless of the fee it would be entitled to charge. The question for the Commissioner to decide is whether compliance would create such a burden for the Council that the request could be justifiably viewed as manifestly unreasonable, in terms of regulation 10(4)(b) of the EIRs.
32. The Commissioner accepts that the burden of providing the information would fall on a small team of people with the technical knowledge required to identify information covered by the request. Given the volume of information potentially covered by Zurich's request, the Commissioner accepts that dealing with the request would require a significant amount of these officers' time, and would divert a disproportionate quantity of its resources away from other essential core operations. Consequently, the Commissioner is satisfied that Zurich's request fell within the terms of regulation 10(4)(b) of the EIRs.
33. The Commissioner must now go on to consider the public interest test in relation to this exception.

Consideration of the public interest test

34. In common with all the other exceptions in the EIRs, regulation 10(4)(b) is subject to the public interest test set out in regulation 10(1)(b). Consequently, information can be withheld under the exception only where, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
35. In its application, Zurich explained that severe flooding had occurred in 2006, 2008 and 2009 resulting in sizeable insurance payments. As noted previously, following the flood in 2006, the Council commissioned a report with recommendations, which had been disclosed to Zurich. Zurich commented that, notwithstanding the warnings in the report, two further serious and severe flooding events had occurred. It had requested the information currently under consideration to ascertain what steps, if any, the Council had taken to act on the warnings provided by their experts.
36. Zurich asserted that there were grounds in favour of disclosure in the public interest which the Council had not considered, namely that:



- disclosure would contribute to ensuring the Council, a public body with statutory responsibilities, can be seen to be, or not to be, adequately performing its duties;
 - disclosure would ensure fairness in relation to complaints or claims by residents or their insurers and would, or would not, reveal malpractice or bad practice.
37. The Council relied upon the public interest arguments put forward in its review response. The Council noted Zurich's arguments that hundreds of thousands of pounds worth of damage had been caused to properties, and the arguments that, given the potentially serious threat to life and limb, it is very much in the public interest for the Council to be required to produce all of its records so that it may be held accountable for any failings identified. In response, the Council noted that court proceedings had been raised in relation to the flooding issue and argued that that forum is the most appropriate place in which the Council should be held accountable.
38. In the Commissioner's view, there is an inherent public interest in disclosure of information that would ensure that an authority is transparent about the nature and extent of the information that it holds, and would permit adequate public scrutiny of its actions. (As Zurich has commented (see paragraph 21), regulation 4 of the EIRs requires the Council to organise and keep up to date environmental information relating to its functions with a view to the active and systematic dissemination of that information.) In this case, there is a clear public interest in the disclosure of information which would permit scrutiny of the steps taken by the Council to mitigate serious flooding and negate or at least reduce the cost of repair, especially as in this instance the Council had commissioned a report which specified the improvements to be made to the burn concerned.
39. On the other hand, there is also a strong public interest in a Scottish public authority being able to carry out its core functions without unreasonable disruption. In this case, the Commissioner is satisfied that if the Council was required to respond to this request it would place a significant burden on the Council in terms of time and expense. Even taking into consideration the size of the Council as an organisation, and the resources available within it, the Commissioner accepts that providing the extensive volume of information requested by Zurich would, to a disproportionate extent, divert resources required to fulfil its other statutory functions, including flood risk management.
40. The Commissioner considers there is a public interest in protecting the integrity of the EIRs and ensuring that they are used responsibly. While public authorities are encouraged towards acting in a transparent and accountable nature which benefits the public as a whole, it is not the intention of the legislation to require public authorities to devote excessive amounts of time to one particular request. The Council has a responsibility to respond to other requests it receives, as well as carrying out its other statutory functions, and there is a public interest in ensuring resources are not diverted away from this.



41. On balance, therefore, while there are certainly strong public interest arguments in favour of disclosure of some of the information covered by Zurich's request, the Commissioner accepts that, in the circumstances of this case, these are outweighed by the public interest in preventing the disproportionate levels of disruption to the Council's core functions that would result if resources were diverted to provide all the information requested by Zurich. The Commissioner therefore concludes that the Council was entitled to withhold the requested information under the exception in regulation 10(4)(b) of the EIRs.

DECISION

The Commissioner finds that South Lanarkshire Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Zurich Insurance plc.

Appeal

Should either Zurich Insurance plc or South Lanarkshire Council wish to appeal against this decision, there is an 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 notice.

Margaret Keyse
Head of Enforcement
9 April 2013



Appendix

Relevant statutory provisions

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;

...

5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...

10 Exceptions from duty to make environmental information available–

(1) A Scottish public authority may refuse a request to make environmental information available if-

(a) there is an exception to disclosure under paragraphs (4) or (5); and

(b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.



- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.

...

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

...

- (b) the request for information is manifestly unreasonable;

...