

Decision Notice



Decision 237/2013 Mr David Kattenhorn and Fife Council

Protection of public right of way

Reference No: 201301168

Decision Date: 24 October 2013

www.itspublicknowledge.info

Rosemary Agnew

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

On 3 March 2013, Mr Kattenhorn asked Fife Council (the Council) for information relating to the consideration given by the Council to a court judgement in relation to gates placed on a public right of way. Following a review, the Council provided Mr Kattenhorn with some information, but relied on exceptions including those in regulations 10(4)(e) (which relates to internal communications) and 10(5)(d) of the EIRs (which relates to confidentiality of the authority's proceedings) for withholding other information.

Following an investigation, the Commissioner found that the Council was not entitled to withhold certain of the information under these exceptions and ordered its disclosure.

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) and 2(b) (Duty to make available environmental information on request); 10(1), (2), (4)(e) and (5)(d) (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 3 March 2013, Mr Kattenhorn wrote to the Council with regard to a court judgement relating to the placing of gates on the public right of way from MacDuff's Cross, Newburgh. In his email, Mr Kattenhorn asked for copies of all relevant documentation (notes, emails, letters or otherwise) indicating the consideration given to the judgement by the Council and anything which indicated the Council's reasoning for action or inaction in this matter.
2. Having received no response to his request, Mr Kattenhorn requested a review in respect of the Council's failure to respond on 5 April 2013.



3. On 3 May 2013, the Council notified Mr Kattenhorn of the outcome of its review. The Council apologised for its failure to respond to the initial request and explained that it held three categories of correspondence relevant to Mr Kattenhorn's request:

- correspondence between it and Perth and Kinross Council (category 1)
- correspondence with named individuals (category 2)
- correspondence between Fife Council employees (category 3).

Some information from category 1 was disclosed to Mr Kattenhorn, subject to redaction of information the Council considered to be third party personal data. The Council informed Mr Kattenhorn that, as the other information in category 1 was legal advice received from Perth and Kinross Council, this was being withheld under regulation 10(5)(d) of the EIRs.

In relation to information in category 2, the Council explained that this comprised the personal data of a third party and was therefore withheld under regulation 11 of the EIRs.

The Council relied on the exception in regulation 10(4)(e) of the EIRs for withholding the information in category 3, as it argued that this comprised internal communications within the Council and the public interest favoured withholding the information.

4. On 14 May 2013, Mr Kattenhorn wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review in relation to the information in categories 1 and 3, 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.

5. The application was validated by establishing that Mr Kattenhorn made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

6. On 10 June 2013, the Council was notified in writing that an application had been received from Mr Kattenhorn and was asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.

7. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its application of the exceptions in regulations 10(4)(e) and 10(5)(d) of the EIRs to the information covered by Mr Kattenhorn's application. The Council provided submissions, aspects of which the investigating officer clarified with the Council during the investigation.



8. During the investigation, the Council disclosed further information to Mr Kattenhorn, subject to redaction of information it considered to be third party personal data. Mr Kattenhorn confirmed that he had received this information. He also confirmed that he was not concerned about the redaction of personal data from the information.
9. Mr Kattenhorn provided submissions on why he considered the public interest to favour the remaining withheld information being made available. He did not challenge the Council's decision to deal with his request under the EIRs.

Commissioner's analysis and findings

10. 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 Mr Kattenhorn and the Council. She is satisfied that no matter of relevance has been overlooked.

Regulation 10(4)(e) – Internal communications

11. Under regulation 10(4)(e), a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications. For information to fall within the scope of the exception, it need only be established that the information is an internal communication.
12. Having considered the content of the information remaining withheld under this exception, the Commissioner accepts that it comprises internal communications between Fife Council employees.
13. As with all the exceptions in regulation 10, a Scottish public authority applying this exception must interpret it 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 made available unless, in all the circumstances of the case, the public interest in making it available is outweighed by that in maintaining the exception (regulation 10(1)(b)).

Public interest test

14. The Council commented that it might be in the applicant's interest to obtain this communication to discover how it had approached the matter and what action it was going to take in relation to the court order. However, the Council considered it to be of greater concern that a legal challenge might result from its actions or inactions, and with this in mind identified a greater public interest in being able to develop its own legal arguments and strategies with the privacy required, and without relevant advice and views being exposed, therefore potentially prejudicing any future proceedings to the Council's disadvantage. The Council emphasised that it needed to ensure it was acting within its legal powers and in its own best interests and those of the public at large.



15. Mr Kattenhorn understood the arguments being made by the Council, and acknowledged that public bodies needed to be able to think in private, but considered the public interest to be better served by release of the information.
16. In his application, Mr Kattenhorn commented that, in his view:
 - the Council had failed to act on the court's judgement, more than three years after it was made
 - despite repeated requests, the Council had failed to expound a plan of action, legal reasoning for its inaction or any timescale when any action or decision was expected: they were not prepared to enter any discussion on the matter
 - from the information released, there seemed to be a lack of clarity in the decision making process (he provided examples).

He referred to three information requests on the same subject in the current year, and also to the issue being raised at the Fife Access Forum.
17. With these comments in mind, Mr Kattenhorn concluded that the public interest lay in ensuring that the information was accessible, to improve accountability, participation and scrutiny of decision making processes.
18. Mr Kattenhorn also believed disclosure of the withheld information would contribute to debate on a matter of particular public interest, and would contribute to ensuring that the Council was adequately discharging its regulatory functions.
19. Having carefully considered the arguments from both the Council and Mr Kattenhorn, the Commissioner accepts that the issues raised by this particular right of way are of public interest. The Commissioner is aware that these have been widely reported and are of interest to the Scottish Rights of Way & Access Society (SCOTWAYS). In light of this, the Commissioner acknowledges that there is a significant level of public interest in understanding what actions the Council can take, and has taken, along with the related decision-making process.
20. Having considered the remaining information which has been withheld under this exception, the Commissioner accepts that making it available would go some way towards informing interested members of the public of discussions within the Council, decisions reached and actions taken in relation to the right of way.
21. That said, the Commissioner recognises that these issues are still ongoing and remain unresolved. In the circumstances, she accepts that release of the information might well prejudice any future proceedings raised by or against the Council in relation to this matter, or at least constrain the Council's position in relation to such proceedings, which would not be in the public interest.



22. On balance, the Commissioner has concluded that the public interest lies in maintaining the exception and withholding this information from Mr Kattenhorn. Consequently the Commissioner is satisfied that the Council was entitled to withhold the information under the exception in regulation 10(4)(e) of the EIRs.
23. As the Commissioner is satisfied that the Council was correct to rely on the exception in regulation 10(4)(e) for this information, she is not required to consider the application of regulation 10(5)(d) to the information.

Regulation 10(5)(d)

24. The Council explained that the remaining information withheld under this exception was all legal advice from its solicitors, or requests for such advice. Regulation 10(5)(d) of the EIRs states 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 the proceedings of any public authority where such confidentiality is provided for by law.
25. In its publication “The Aarhus Convention: An Implementation Guide [Second Edition 2013]”¹, the Economic Commission for Europe notes, at page 81, that “the Convention does not define ‘proceedings of public authorities’ but one interpretation is that these may be proceedings concerning the internal operations of a public authority and not substantive proceedings conducted by the public authority in its area of competence. The confidentiality must be provided for under national law.”
26. As with all exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be 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)).
27. The first matter to be addressed by the Commissioner, therefore, is whether the information relates to proceedings of the Council, the confidentiality of which is protected by law. She must then consider whether disclosure of the information would, or would be likely to, prejudice substantially the confidentiality of those proceedings.
28. In many cases where this exception applies, there is a specific statutory provision prohibiting release of the information. However, there will also be cases where the common law of confidence will protect the confidentiality of the proceedings. One aspect of this is the law relating to confidentiality of communications, which embraces the rules and principles applying to legal professional privilege (specifically, legal advice privilege).

¹ <http://www.unece.org/index.php?id=32764>



29. The Council submitted that making this information available would disclose the nature of the legal advice obtained by the Council. The Council submitted that its solicitor was clearly acting in a professional relationship with their client (i.e. the Council) at the time, and the communications occurred in that context.
30. On the question of substantial prejudice, the Council explained that the issues discussed in the privileged information remained current and could give rise to litigation. Therefore, release could cause substantial prejudice to the confidentiality of the Council's proceedings.
31. The Commissioner is satisfied that most of the withheld information is a record of the seeking and provision of legal advice from a legal adviser, all within the context of a professional relationship in circumstances in which legal professional privilege could apply. The Commissioner takes the view that a claim to confidentiality of communications could be maintained in legal proceedings in respect of this information. The substance of the legal advice received has not been disclosed, and so the confidentiality of the advice has been maintained.
32. The Commissioner must consider whether disclosure of the privileged information would have prejudiced substantially, or would have been likely to prejudice substantially, the confidentiality of the Council's proceedings in terms of regulation 10(5)(d). In this connection, the Commissioner accepts, as she has in previous cases, that the process of obtaining legal advice can be accepted as relevant proceedings for the purposes of regulation 10(5)(d).
33. The Commissioner has made clear in previous decisions that the test of substantial prejudice is a high one, requiring a real risk of actual, significant harm. In this case, the Commissioner accepts that the issues discussed in the privileged information remain current (despite the age of some of the information) and could give rise to litigation. In the circumstances, given the content of the information and its privileged nature, the Commissioner accepts that making it available would have caused, or would have been likely to cause, substantial prejudice to the confidentiality of the Council's proceedings. Consequently, the Commissioner accepts that the exception in regulation 10(5)(d) applied to that information.
34. For that information where she has accepted that the exception applies, the Commissioner must consider (as required by regulation 10(1)(b) of the EIRs) whether the public interest in making the information available is outweighed by the public interest in maintaining the exception.
35. As mentioned above, however, the Commissioner is not satisfied that all of the withheld information is exempt under regulation 10(5)(d). The Commissioner does not agree that the information withheld in document B2 (although involving a solicitor) can be accepted as a communication covered by legal advice privilege, i.e. one in which legal advice is sought or given. Therefore, the Commissioner does not agree that this information is protected by legal advice privilege. No other reason having been given for applying regulation 10(5)(d) to this information, the Commissioner cannot accept that the regulation applies.



36. As the Council has not relied on any other exceptions for withholding the information listed in paragraph 35, the Commissioner requires it to disclose that information to Mr Kattenhorn. The personal data of third parties, which Mr Kattenhorn does not require, should be redacted in line with regulation 11(3) of the EIRs.

The public interest test

37. The Council submitted that it needed to ensure it was complying with its obligations in terms of the Land Reform (Scotland) Act 2003 and other legislation, and must ensure that it is acting within its powers in exercising its statutory functions. The Council explained that it had obtained, and would continue to obtain, legal advice to ensure the legitimacy of its actions and defend its actions from legal challenge. In order to do this, the Council argued that it must be able to obtain legal advice from internal and external advisers where required, and keep that advice confidential to protect its position. The Council considered that otherwise it would be at a severe disadvantage to those who might wish to challenge its position.
38. The Council appreciated that release of the legal advice might lend greater understanding to how it considered its actions in this particular matter. That said, the Council argued that as the matter remained current, and there was still a possibility of future legal proceedings, it considers there to be no wider public interest in the release of information which might jeopardise its own position.
39. The Council noted the Commissioner's recognition (and that of the courts) of the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds, and also in the maintenance of confidences more widely.
40. Mr Kattenhorn relied on the same public interest arguments as those set out above in relation to regulation 10(4)(e).
41. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48*, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege generally. More generally, she considers there to be a strong public interest, also recognised by the courts, in the maintenance of confidences.
42. On the basis of the evidence presented by the Council, the Commissioner accepts that future litigation on this matter remains a real possibility. This adds weight to the argument that it is in the public interest to protect the confidentiality of privileged communications.
43. The Commissioner acknowledges that disclosure of this information would help to fulfil the public interest in understanding the Council's consideration of, and provide clarity on how it discharged its regulatory functions in relation to, this matter.



44. On the other hand, the Commissioner recognises the strong public interest in ensuring that the Council can receive legal advice in confidence to facilitate it in discharging its functions as thoroughly and effectively as possible, with the minimum practicable cost to the public purse.
45. On balance, having examined the withheld information, the Commissioner is not satisfied that the public interest arguments in favour of disclosure presented by Mr Kattenhorn are so strong as to outweigh the strong public interest arguments in maintaining the exception. Consequently, she finds that the public interest in maintaining the exception outweighs the public interest in disclosure, and accepts that such information as she has found to be excepted under regulation 10(5)(d) was properly withheld under that exception.

DECISION

The Commissioner finds that (in respect of information covered by Mr Kattenhorn's application and remaining withheld by the close of the investigation) Fife Council partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Kattenhorn.

The Commissioner finds that the Council was correct to rely on the exception in regulation 10(4)(e) and 10(5)(d) of the EIRs for withholding certain information from Mr Kattenhorn.

However, the Commissioner finds that the Council was not entitled to withhold certain other information under regulation 10(5)(d).

The Commissioner therefore requires the Council to disclose the information in document B2, subject to redaction of third party personal data, by 9 December 2013.

Appeal

Should either Mr Kattenhorn or Fife 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
24 October 2013



Appendix

Relevant statutory provisions

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
 - ...
 - (e) the request involves making available internal communications.
- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-
 - ...
 - (d) the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law;
 - ...