

Decision Notice

Decision 142/2014 Ms Diana Cairns and East Renfrewshire Council

Portobello Park Private Bill

Reference No: 201400615

Decision Date: 30 June 2014



Scottish Information
Commissioner

Summary

On 13 January 2014, Ms Cairns asked East Renfrewshire Council (the Council) for information held relating to plans for Cowan Park which made reference to the Portobello Park private bill or the related Court of Session ruling. The Council supplied some information but withheld the remainder on the basis that it was subject to legal advice and litigation privilege.

Following an investigation, the Commissioner found that the Council was entitled to withhold the information on the basis that regulation 10(5)(b) of the EIRs applied.

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 of request); 10(1), (2) and (5)(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 13 January 2014, Ms Cairns wrote to the Council requesting all information “... relating to the plans for the Cowan Park that mention the Portobello court ruling and the proposed Portobello Park private bill”.
2. The Council responded on 17 January 2014, providing Ms Cairns with a copy of a Cabinet report. It withheld other information, which it stated was correspondence and advice from external and internal legal advisors. The Council handled the request under the EIRs.
3. On 28 January 2014, Ms Cairns wrote to the Council requesting a review of its decision.
4. The Council notified Ms Cairns of the outcome of its review on 26 February 2014. The Council confirmed it was relying on section 39(2) of the Freedom of Information (Scotland) Act 2002 (FOISA) and that the information withheld was subject to both legal advice and litigation privilege. Having considered the public interest, it concluded that the information should be withheld under regulation 10(5)(b) of the EIRs.
5. On 17 March 2014, Ms Cairns wrote to the Commissioner, stating that she 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 specified modifications.
6. The application was validated by establishing that Ms Cairns 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

7. On 31 March 2014, the Council was notified in writing that an application had been received from Ms Cairns and was asked to provide the Commissioner with the information withheld from her. The Council provided the information and the case was then allocated to an investigating officer.
8. 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 reliance on any provisions of the EIRs it considered applicable to the information requested.

Commissioner's analysis and findings

9. 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 Ms Cairns and the Council. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

10. It is clear from the Council's correspondence with both Ms Cairns 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. This view is confirmed by consideration of the information itself. The information relates to a proposal for the substantial redevelopment of land, specifically the use of a park and plans to change that use, and the Commissioner is satisfied that it would fall within either paragraph (a) of the definition of environmental information contained in regulation 2(1) (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). Ms Cairns has not disputed this and the Commissioner will consider the information in what follows solely in terms of the EIRs.

Regulation 10(5)(b)

11. Regulation 10(5)(b) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the course of justice, the ability of an individual to receive a fair trial or the ability of any public authority to conduct an inquiry or a criminal or disciplinary nature. As with all exceptions in regulation 10, it is subject to the public interest test in regulation 10(1)(b) and, in line with regulation 10(1)(a), must be interpreted in a restrictive way with a presumption in favour of disclosure. The Council applied this exception on the basis that the information withheld was subject to both legal advice and litigation privilege.
12. The Commissioner notes that, unlike section 36(1) of FOISA, the wording of regulation 10(5)(b) does not explicitly except from disclosure information in relation to which a claim to confidentiality of communications could be maintained in legal proceedings (subject to the public interest test). However, in the Commissioner's view, this particular exception will often be applicable to information which is covered by legal professional privilege, especially litigation privilege. The Commissioner will consider the Council's reliance on litigation privilege in the first instance.
13. The Commissioner recognises that the course of justice requires that parties to litigation (including public authorities) are able to prepare fully for a case. The principle, derived from the adversarial nature of litigation, is that no party can recover material which another party has made in preparing its own case. Disclosure of information covered by litigation privilege

will in many cases lead to substantial prejudice relevant to the exception in regulation 10(5)(b).

14. However, the Commissioner would also note that, even where information is subject to litigation privilege, an authority still must be satisfied that disclosure would, or would be likely to, cause substantial prejudice to the relevant interests before applying regulation 10(5)(b). Whether relevant harm is likely to occur will depend according to the circumstances of the particular case under consideration, and the likelihood of substantial prejudice may fade over time.
15. Communications *post litem motam* (i.e. those subject to litigation privilege) are granted confidentiality in order to ensure that any person or organisation involved in or contemplating a court action can prepare their case as fully as possible, without the risk that their opponent/s or prospective opponent/s will gain access to the material generated by their preparations. The privilege covers communications at the stage when litigation is pending or in contemplation. Whether a particular document was prepared in contemplation of litigation will be a question of fact, the key question generally being whether litigation was actually in contemplation at a particular time.
16. For information to be covered by litigation privilege, it must have been created for the "dominant purpose" of obtaining legal advice on the litigation or for lawyers to use in preparing the case. This is a question of fact in each case. Information created for another purpose before the litigation was anticipated may sometimes still be covered if brought together for the purpose of the litigation. This may be the case if pre-existing documents are relevant to the case and the lawyer has exercised skill and judgement in selecting and compiling them, particularly if the selection of documents reveals the trend of the advice on the case. However, pre-existing documents will not become privileged just by being passed over to a lawyer.
17. Litigation privilege will apply to documents created by the party to the potential litigation, expert reports prepared on their behalf and legal advice given in relation to the potential litigation: the communication need not involve a lawyer to qualify. The litigation contemplated need never actually happen for the privilege to apply, and it will continue to apply after any litigation has been concluded.
18. The Council explained that the information sought was created in the aftermath of the Council becoming aware of the Portobello decision, which raised concerns regarding the possible status of the land on which a new Barrhead High School was proposed to be built. The various documents and communications were therefore all prepared with a view to addressing this issue through legal process.
19. The Council submitted that the heightened likelihood of litigation being required to resolve this issue placed these documents squarely within the exception regarding litigation privilege. The withheld information, it explained, was a record of the legal advice requested from, and provided by, a legal adviser within the context of a professional relationship, in circumstances in which the Council's position and approach to that litigation was being assessed, canvassed and debated.
20. The Council submitted that the issues discussed in the information remained current at the time of its submissions and were, at the time of investigation, subject to ongoing court process in the Court of Session (commenced in early 2014). The Council stated that it may be required by the Court to further canvass some of the matters contained in the documents.

21. In this case, given the context within which this information was created, the Commissioner finds it reasonable to accept that the information in question was prepared in contemplation of litigation. It is apparent from the timing that litigation was in immediate prospect at the time the Council responded to Ms Cairns' information request and requirement for review. The Commissioner also accepts that the character of the withheld information brings it within the scope of litigation privilege.
22. However, the information cannot be privileged unless it is also confidential. A claim of confidentiality cannot be maintained where, prior to a public authority's consideration of an information request or conduct of review, information has been made public, either in full or in a summary sufficiently detailed to have the effect of disclosing the information. Where confidentiality has been lost in respect of part of or all of the information under consideration, any privilege associated with that information is also effectively lost.
23. During the investigation, the investigating officer identified a published Cabinet minute where the Council's position with regard to the development of Cowan Park was summarised.
24. The Council did not consider this reference to constitute a waiver of legal professional privilege. The Council stated that the minute merely stated that advice had been sought and summarised in the vaguest terms the conclusion reached regarding the need for court action. It did not, the Council argued, narrate or consider the various merits of the matter considered in depth in the legal opinions. The Council concluded that the substance of this legal advice had not been disclosed; consequently, the confidentiality of the advice had been maintained.
25. Having considered the withheld information in light of the information available in the public domain, the Commissioner is satisfied that privilege has not been waived. She is satisfied that the published information did not represent such a comprehensive summary that waiver could be said to have occurred.
26. Given the confidentiality afforded to these communications, the Commissioner accepts the withheld information was (and remains) subject to litigation privilege. As recognised above (paragraph 13) the course of justice requires that parties to litigation (including public authorities) are able to prepare fully for a case. The Council submitted that the issues discussed in the withheld information remained current at the time of the appeal to the Commissioner, subject to ongoing court process in the Court of Session. The Commissioner is satisfied that this litigation was in genuine prospect at the time the Council responded to Ms Cairns' requirement for review and, in the context of that particular process, she accepts that disclosure would have prejudiced, or would have been likely to prejudice, the course of justice substantially. She has reached this conclusion bearing in mind the general importance attached by the courts to maintaining confidentiality of communications on administration of justice grounds, and also the more specific issues presented by the prospect of litigation in this particular case.
27. Consequently, the Commissioner is satisfied that the Council was entitled to apply regulation 10(5)(b) to this information.

Public interest test

28. Having found that the Council correctly applied the exception in regulation 10(5)(b) to this information, the Commissioner is required to consider the public interest test in regulation 10(1)(b). This specifies that a public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

29. In her correspondence with the Commissioner, Ms Cairns set out why she considered it in the public interest that this information be disclosed. At the time of her application, she stated that City of Edinburgh Council was pursuing a private bill through the Scottish Parliament to allow building on Portobello Park (which was common good land). She believed that, if this bill was passed, it would set a precedent for other councils in Scotland to follow, allowing them to appropriate common good land for other purposes than those for which it was intended.
30. Ms Cairns explained that she made this request as East Renfrewshire Council wished to build on Cowan Park, also common good land, and she was interested in the advice the Council held which referred to Portobello Park and the potential wider application of the private bill, should it be passed. She argued that the public interest was heightened in this case because the Council was not acting as a public authority in the conventional sense, but rather as a quasi-trustee of the common good.
31. Ms Cairns stated that there was a considerable significant concern across Scotland about the precedent for common good land that would be set by the private bill, if passed. As the Council had released information to the effect that it had considered the use of a private bill to enable it to build on common good land, she believe the public interest in making the information available outweighed the Council's wish to retain the confidentiality of its legal opinions.
32. In considering the public interest, the Council noted the requirement to interpret the exceptions in a restrictive fashion. The Council stated that it had taken account the position regarding the nature of the common good land and its responsibilities in that regard. However, it also considered its responsibilities to the public purse generally, and its obligations in the context of education provision in particular, to be at least substantial. It considered there to be a strong public interest in its ability to fulfil these obligations, through pursuit of legal action in the most efficient and informed manner possible.
33. The Council also argued that it was in the public interest that an authority could communicate with its legal advisors freely and frankly, in confidence, in order that it could obtain the most comprehensive legal advice about proposed actions and defend or pursue its position accordingly. It believed it was accepted and acknowledged that the situation relative to the rebuilding of Barrhead High School and the use of the land within Cowan Park for that purpose was of major significance to the residents in that area .
34. In addition, the Council noted that the specific terms of this request focussed on reference to the Portobello situation, a matter only incidental to the Council's own deliberations. It submitted that the withheld information made only limited reference to Portobello, and much of that was only passing. The Council concluded that it would be disproportionate to release the legal advice, given the general acknowledgement of the public interest in its confidentiality against the minimal relevance of Portobello within the information.
35. In determining where the balance of the public interest lies, the Commissioner must take into account the significant weight to be attached, on administration of justice grounds, the public interest in maintaining confidentiality between legal adviser and client. There may be occasions where this significant public interest is outweighed by the public interest in disclosing the information where, for example:
 - the requirement for disclosure is overwhelming
 - the privileged material discloses wrongdoing by/within an authority
 - the material discloses a misrepresentation to the public of advice received
 - the material discloses an apparently irresponsible and wilful disregard of advice

- a large number of people are affected by the advice
- the passage of time is so great that disclosure cannot cause harm.

36. The Commissioner has considered the public interest arguments advanced by both parties, bearing in mind the considerations set out in the preceding paragraph. She has also taken into account the extent to which the Portobello situation is referred to in the withheld information, which she accepts is limited and marginal.
37. The Commissioner acknowledges that the appropriation and development of common good land raises issues of considerable public interest and concern, regardless of the perspective from which it is approached. Having considered the submissions received in this particular case, she acknowledges that there are points favouring both making the information available and withholding it. In all the circumstances, having weighed all relevant considerations, the Commissioner is not satisfied that the public interest in making this particular information available is sufficiently compelling to outweigh the strong public interest in maintaining litigation privilege.
38. Consequently, the Commissioner accepts that the Council correctly withheld the information to which it applied regulation 10(5)(b) of the EIRs.

Decision

The Commissioner finds that East Renfrewshire Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Ms Cairns.

Appeal

Should either Ms Cairns or the 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
30 June 2014

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

...

"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.

...

(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-

...

- (b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;

...

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