

Decision Notice

Decision 207/2017: Mr David Howell and the Scottish Environment Protection Agency

Transfer of soil between building sites

Reference No: 201701428

Decision Date: 12 December 2017



Summary

SEPA was asked for information relating to the transfer of soil between specified building sites. SEPA withheld some information, under the exception relating to information provided voluntarily by a third party.

The Commissioner investigated and found that SEPA had properly responded to the request in terms of the EIRs. He accepted that information was correctly withheld under the exception claimed.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of “environmental information”) (Interpretation); 5(1) and 2(b) (Duty to make available environmental information on request); 10(1), (2) and (5)(f) (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 5 January 2017, Mr Howell made a request for information to the Scottish Environment Protection Agency (SEPA). Mr Howell made reference to two specific planning permissions and an enforcement notice appeal and requested:

... all correspondence, e-mails, notes of telephone conversations by staff, officials, employees and Stirling Councillors relating to the above Planning Applications and Enforcement Notice relating to the removal and transfer of soil from the properties / building sites at [named address] to [named address].
2. SEPA responded on 1 February 2017. It advised that it had applied section 39(2) of the Freedom of Information (Scotland) Act 2002 (FOISA), as the request was for environmental information and fell to be considered under the EIRs. It explained that it was withholding correspondence between it and a third party, which it considered to be excepted under regulation 10(5)(f) of the EIRs. SEPA explained why the exception applied.
3. On 5 February 2017, Mr Howell wrote to SEPA requesting a review of its decision, on the basis that he disagreed that the exception applied.
4. SEPA notified Mr Howell of the outcome of its review on 19 April 2017. It explained that it believed it should have advised him that some of the information previously withheld under regulation 10(5)(f) should have been withheld under regulation 11(2) of the EIRs as personal data. It provided Mr Howell with one email with personal data redacted. It maintained that the information contained in the remaining emails was excepted from disclosure under regulation 10(5)(f) of the EIRs.
5. On 14 August 2017, Mr Howell wrote to the Commissioner. He applied 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. Mr Howell confirmed he was dissatisfied with the outcome of SEPA's review because he did not consider the exception under regulation 10(5)(f) of the EIRs applied to the withheld information.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Howell made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 18 September 2017, SEPA was notified in writing that Mr Howell had made a valid application. SEPA was asked to send the Commissioner the information withheld from Mr Howell. SEPA provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 5 October 2017, SEPA was invited to comment on the application and answer specific questions, focusing on the requirements of regulation 10(5)(f) of the EIRs.
9. SEPA responded on 26 October 2017. On the basis that it considered the request to be for environmental information, to be considered in terms of the EIRs, it adhered to its earlier application of section 39(2) of FOISA. SEPA also confirmed that it wished to rely on regulation 10(5)(f) of the EIRs to withhold the information under consideration in this investigation.
10. Mr Howell also provided submissions, explaining why he disagreed with the application of regulation 10(5)(f) of the EIRs and why he considered disclosure of the information was in the public interest.

Commissioner's analysis and findings

11. 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 him by both Mr Howell and SEPA. He is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

12. It is apparent from the terms of the request that the information caught by it would be environmental information as defined by regulation 2(1) of the EIRs. The information in question relates to planning applications and the movement of soil and, as such, the Commissioner is satisfied that it would fall within either paragraph (a) or paragraph (c) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in the Appendix to this decision).
13. In *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹, the Commissioner confirmed (at paragraph 51) that where environmental information is concerned, there are two separate statutory frameworks for access to that information and, in terms of the legislation, an authority is required to consider the request under both FOISA and EIRs.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200600654.aspx>

Section 39(2) of FOISA – environmental information

14. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) 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 SEPA was entitled to apply the exemption to the withheld information, given his conclusion that it is properly classified as environmental information.
15. 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 dealing with the request under FOISA. The Commissioner will therefore consider the information in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs

16. 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. This obligation relates to information that is held by the authority when it receives a request.
17. 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.

Regulation 10(5)(f) of the EIRs

18. Regulation 10(5)(f) 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 interests of the person who provided that information, where that person -
 - (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from the EIRs, be made available; and
 - (iii) has not consented to its disclosure.

Does regulation 10(5)(f) apply in this case?

19. A number of factors should be addressed in considering whether this exception applies. These include:
 - Was the information provided by a third party?
 - Was the provider, or could the provider be, required by law to provide it?
 - Is the information otherwise publicly available?
 - Has the provider consented to disclosure?

- Would disclosure of the information cause, or be likely to cause, substantial harm to the interests of the provider?

Was the information provided by a third party?

20. Having viewed the withheld information, the Commissioner accepts that the information withheld by SEPA was provided by a third party.

Was the provider, or could the provider be, required by law to provide it?

21. SEPA submitted that the information provided by the third party was not required for a regulatory purpose: that being the case, it did not consider the third party was under, or could have been put under, any legal obligation to supply the information in the emails.
22. The Commissioner notes the submissions made by Mr Howell, in which he highlights the regulatory provisions in the Landfill (Scotland) Regulations 2003. While these provisions may be relevant to the sites referred to in Mr Howell's application, the Commissioner can identify nothing in them which could reasonably be interpreted as empowering SEPA to require the provision of the withheld information.
23. Having viewed the withheld information, and taking account of the submissions by both SEPA and Mr Howell, the Commissioner is satisfied that it is not (in the context in which it was provided) information that the provider was required, or could have been required, to provide by law.

Is the information otherwise publicly available?

24. SEPA submitted that the information subject to this investigation was not publicly available. It was not, for example, information available via any SEPA public register.
25. Having considered the information withheld, the Commissioner is satisfied that the withheld information is not (and has not been) otherwise available to the public.

Has the provider consented to disclosure?

26. SEPA submitted it had consulted with the third party and that consent to disclosure had been refused. It provided evidence of consent being sought and refused.
27. The Commissioner is satisfied that the third party has refused consent for the information to be disclosed.

Substantial prejudice

28. As regulation 10(5)(f) is focused on substantial prejudice to the interests of the person who provided the information, SEPA explained to the Commissioner how that disclosure would substantially prejudice the interests of the third party in question. The Commissioner further notes that the third party has objected to its disclosure and has specified the nature of the harm that they believe disclosure would cause.
29. In the circumstances of this case, the Commissioner cannot reproduce the explanations provided by SEPA or go into the details of the substantial prejudice disclosure would cause, as to do so would necessitate referencing the information that has been withheld. The Commissioner is, however, satisfied that disclosure of the withheld information would, or would be likely to, substantially prejudice the third party who provided the information to SEPA.

30. The Commissioner has therefore found that SEPA correctly applied the exception in regulation 10(5)(f) to the information under consideration. He will now go on to consider the balance of the public interest in relation to the information.

Public interest test

31. The exception in regulation 10(5)(f) is subject to the public interest test in regulation 10(1)(b) of the EIRs. Even if an exception has been judged to apply, a Scottish public authority may only refuse a request to make environmental information available if, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (that is, in withholding the information).

Mr Howell's submissions

32. Mr Howell provided submissions as to why he considered the information requested should be disclosed, some of which amounted to complaints regarding the actions or perceived failures to act by SEPA in relation to its legislative obligations. He commented that it was in the public interest that the information be disclosed to allow transparency, and in particular to illustrate whether or not SEPA had complied with its legal obligations. He commented that the circumstances of this case, regarding the transfer and storage of soil, was of serious concern to the public, and it was in the public interest to have matters fully disclosed which were directly related to SEPA's regulatory role and whether it had been performed adequately.

SEPA's submissions

33. In this case, SEPA recognised that disclosure would be in the public interest insofar as it would promote transparency and accountability of public authorities in relation to the application of due process and its regulation of the environment.
34. Against this, however, SEPA submitted that it had to take account of the third party's position, which was that the information had been provided voluntarily and on the expectation that it would remain private. It added that disclosure of information provided voluntarily to SEPA by third parties would harm the duty of confidence underpinning the free flow of information to SEPA, in such circumstances.
35. SEPA further submitted that it had previously advised Mr Howell of its Complaints Handling Procedure, with right of appeal to the Scottish Public Services Ombudsman, which might be an option for addressing his concerns.

The Commissioner's conclusions

36. Paragraph 7 of the Commissioner's briefing on the public interest (under the EIRs)² states:

The EIRs do not define the public interest, but it has been described elsewhere as "something which is of serious concern and benefit to the public", not merely something of individual interest. It has also been described as "something that is "in the interest of the public", not merely "of interest to the public." In other words, it serves the interests of the public.

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/ThePublicInterestTestEIRs.aspx>

37. In considering the public interest in disclosure against that in maintaining the exception, the Commissioner acknowledges the general public interest in transparency in environmental matters, and the reasons Mr Howell has given to show why he believes disclosure of the information would be in the public interest.
38. Against this, the Commissioner must balance the public interest in avoiding harm to the interests of the third party. Having considered the information that has been withheld, the Commissioner is satisfied that it does not relate to a regulatory matter, as suggested by Mr Howell, but is a record of what were, in effect, private discussions between the third party and SEPA.
39. The Commissioner has also borne in mind that the effectiveness of SEPA's regulatory work depends to a significant extent on the free flow of information from members of the public. While the information under consideration here may not relate directly to a regulatory matter, the Commissioner accepts that there would be a genuine risk to that free flow of information were information of the kind under consideration here, provided in the circumstances of these communications, to be disclosed.
40. The Commissioner also notes that the third party has strongly objected to disclosure of the information. Taking all of these matters into consideration, the Commissioner finds that disclosure would not be in the public interest. The information concerns private matters that are not related to SEPA's regulatory process. The Commissioner does not consider that disclosure of the information would promote transparency and accountability of public authorities and would not assist Mr Howell in the points he has raised with the Commissioner.
41. Consequently, the Commissioner finds that the public interest in maintaining the exception in regulation 10(5)(f) of the EIRs outweighs the public interest in disclosure of the withheld information, and therefore that SEPA was entitled to withhold the information in question under regulation 10(5)(f) of the EIRs.

Decision

The Commissioner finds that the Scottish Environment Protection Agency (SEPA) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 and with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr Howell.

Appeal

Should either Mr Howell or SEPA 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

12 December 2017

Appendix 1: 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.

...

- (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-

...

- (f) the interests of the person who provided the information where that person-
- (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
 - (iii) has not consented to its disclosure; or

...

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