

Decision Notice

Decision 172/2018: Mr H and Fife Council

Property ownership

Reference No: 201800792

Decision Date: 31 October 2018



Scottish Information
Commissioner

Summary

The Council was asked why it was unable to establish who owned a particular piece of land. The Council withheld information on the basis that it was subject to legal professional privilege.

The Commissioner accepted that the withheld information was privileged and was satisfied that the Council was entitled to it under the exception relating to internal communications.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a), (c) and (f) of “environmental information”); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2) and (4)(e) (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 12 August 2017, Mr H made a request for information to Fife Council (the Council) in which he asked to be sent a report so he could discover how the Council was unable to establish ownership of an area of ground near an address in Crail.
2. The Council responded on 13 September 2018, stating that it did not hold the information Mr H described in his request and applying the exception in regulation 10(4)(a) of the EIRs.
3. On 22 October 2018, Mr H wrote to the Council, requesting a review of its decision as he was convinced there had been a report.
4. The Council notified Mr H of the outcome of its review on 15 November 2018. The Council confirmed that it did not hold a “report” as such but did hold email communications relating to its investigations into ownership. It applied the exceptions in regulations 10(5)(b) (prejudice to the course of justice) and 10(5)(d) (confidentiality of proceedings) to the withheld information, on the basis that legal professional privilege applied.
5. On 5 May 2018, Mr H wrote to the Commissioner. Mr H applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act (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 H stated he was dissatisfied with the outcome of the Council’s review because he did not accept the Council was entitled withhold information which would explain the conclusions reached on ownership of the land in question.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr H 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 15 June 2018, the Council was notified in writing that Mr H had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr H. The Council 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. The Council was invited to comment on this application and to answer specific questions, focusing on the requirements of the exceptions it had applied in its review outcome. It provided submissions in response, applying the exception in regulation 10(4)(e) of the EIRs in addition to those claimed earlier.

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 him by both Mr H and the Council. He is satisfied that no matter of relevance has been overlooked.
10. In his application, Mr H suggested that the Council should be in a position to indicate if it owned the land. In this context, the Commissioner must note that his remit only extends to the recorded information a Scottish public authority holds on a particular matter: in other words, he can only consider what the authority's records actually say and not what they should say.
11. Having considered the terms of Mr H's request, the Commissioner is satisfied that its focus is the means employed by the Council in considering ownership of the land in question. Mr H did not ask for information confirming ownership, even if that may be a related matter.

Information held by the Council

12. The Council confirmed that there was no "report", as such, produced in relation to this particular ownership, but (as confirmed to Mr H in its review outcome) legal advice was obtained on the question of ownership. This advice comprised a series of internal emails, which were withheld from Mr H under regulation 10(4)(e) (*inter alia*) of the EIRs.
13. The Council also provided full explanations of the internal map-based resources that were searched in seeking to establish ownership. It also explained that an external searching agency was instructed to carry out searches in the Registers of Scotland when nothing was located on these internal resources. In the absence of any title records being located, as was the case here, it submitted that no transactions would have been recorded against the land and therefore there would be no relevant financial information held.
14. The Council acknowledged it, or its predecessors, might have maintained the land in question as it has records of it maintaining the land in question, but it did not follow that it owned the land.
15. On the balance of probabilities, the Commissioner is satisfied that the Council has identified and located any information it holds and which falls within the scope of the request.

Regulation 10(4)(e) of the EIRs (internal communications)

16. Under regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that it involves making available internal communications. In order for information to fall within the scope of this exception, it need only be established that the information is an internal communication. If the Commissioner finds that a document is an internal communication, he will be required to go on to consider the public interest test in regulation 10(1)(b).
17. The Council applied this exception to all of the withheld information within a series of emails seeking and providing legal advice on the land in question. The Council stated that the information comprised entirely internal communications, in this instance between an in-house solicitor and their client.
18. Having considered the information withheld by the Council under this exception, the Commissioner is satisfied that all of this information comprises internal communications and is therefore subject to the exception in regulation 10(4)(e).
19. He must therefore go on to consider whether, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

The public interest

20. Mr H identified concerns that the land in question was subject to erosion and submitted that it was in the public interest to know who was responsible for preventing this. .
21. The Council acknowledged that there was a strong public interest in disclosure, for reasons of transparency and accountability. However, the Council also considered it essential that it could communicate with legal advisers and obtain legal advice in confidence in relation to ongoing and potential actions. It was also essential that the Council be able to fulfil its functions by defending or pursuing legal actions in the most efficient and informed manner possible, through the provision of legal advice.
22. The Council submitted that disclosure of the withheld information would be detrimental to its ability to do these things freely. It submitted that 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. For these reasons, the Council concluded, on balance, that the public interest favoured withholding the information.

The Commissioner's view

23. The Commissioner has considered all of these submissions carefully, alongside the withheld information (which he has accepted comprises internal communications for the purposes of this exception).
24. The Commissioner recognises the public interest in accountability and transparency with regard to the decision making processes of public authorities, and in understanding how particular decisions are reached and how particular strategies are developed.
25. The Commissioner also accepts, however, that there is a public interest in ensuring that legal advice can be imparted freely and frankly, and options can be considered on a fully informed basis. He recognises the potential harm to the Council's ability to defend or pursue related legal proceedings, should the information be made available to the public. In any case, he recognises the inherent public interest in maintaining confidentiality of communications where legal professional privilege applies (as it does here).

26. In the particular circumstances of this case, the Commissioner concludes, on balance, that the public interest in making this information available is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs. Therefore, he considers the Council to have been justified in withholding the information under this exception.
27. As the Commissioner has concluded that all of the withheld information is excepted from disclosure under this exception, he has not gone on to consider the Council's application of the exceptions in regulations 10(5)(b) and (d) of the EIRs.

Decision

The Commissioner finds that Fife Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr H.

Appeal

Should either Mr H 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

31 October 2018

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;

...

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

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.

...

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