

Decision Notice



Decision 298/2013 Livingstone Terrace Residents Action Group and the
Scottish Public Services Ombudsman

Information relating to a complaint investigation

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www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

On 2 February 2013, Livingstone Terrace Residents Action Group (LTRAG) asked the Scottish Public Services Ombudsman (the SPSO) for specified information supplied to the SPSO by a particular public authority during a complaint investigation. The SPSO withheld the information under section 26(a) of FOISA and regulation 10(5)(d) of the EIRs on the basis that there was a statutory prohibition on its disclosure.

Following an investigation, the Commissioner found that the SPSO was entitled to withhold the requested information under section 26(a) of FOISA and regulation 10(5)(d) of the EIRs.

The Commissioner also found that by failing to identify and respond to LTRAG's information request as one partially seeking environmental information as defined in regulation 2(1) of the EIRs, the SPSO breached regulations 5(1) and 2(b) of the EIRs. Additionally, she found that, in failing to provide adequate advice and assistance to LTRAG, the SPSO failed to comply with section 15(1) of FOISA and regulation 9(1) of the EIRs.

The Commissioner did not require the SPSO to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (b) and (2)(b) (Effect of exemptions); 15(1) (Duty to provide advice and assistance); 26(a) (Prohibitions on disclosure); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a) and (c) of "environmental information"); 5(1) and (2) (Duty to make environmental information available on request); 9(1) (Duty to provide advice and assistance); 10(1), (2) and (5)(d) (Exceptions from duty to make environmental information available)

The Scottish Public Services Ombudsman Act 2002 (the SPSO Act) section 19 (Confidentiality of information)

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.

Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 (the Section 60 Code)



Background

1. On 2 February 2013, LTRAG emailed the SPSO requesting information that had been provided to the SPSO by a Scottish public authority. The information in question related to a complaint regarding a planning matter and had been supplied to the SPSO during a complaint investigation conducted by the SPSO.
2. The SPSO responded on 4 February 2013. It appeared to process LTRAG's request as a continuation of correspondence relating to an earlier subject access request under the Data Protection Act 1998 (the DPA).
3. On 11 February 2013, LTRAG wrote to the SPSO, requesting a review in respect of its failure to respond to the information request of 2 February 2013.
4. On 8 March 2013, the SPSO responded to LTRAG's correspondence of 11 February 2013. The SPSO informed LTRAG that it had been provided with all the personal data that could be released under the DPA.
5. Following an application to the Commissioner which resulted in *Decision 109/2013 Livingstone Terrace Residents Action Group and the Scottish Public Services Ombudsman*¹, the Commissioner required the SPSO to undertake a review and respond to LTRAG in line with the requirements of section 21 of FOISA.
6. The SPSO notified LTRAG of the outcome of its review on 26 June 2013. The SPSO informed LTRAG that the information it had requested was exempt from disclosure in terms of section 26(a) of FOISA.
7. On 12 July 2013, LTRAG wrote to the Commissioner, stating that it was dissatisfied with the outcome of the SPSO'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.
8. The application was validated by establishing that LTRAG 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.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2013/201300734.aspx>



Investigation

9. On 18 July 2013, the SPSO was notified in writing that an application had been received from LTRAG and was asked to provide the Commissioner with any information withheld from it. The SPSO responded with the information requested and the case was then allocated to an investigating officer.
10. The investigating officer subsequently contacted the SPSO, 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. The SPSO was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested. Additionally, the investigating officer pointed out that at least some of the information sought by LTRAG appeared to comprise environmental information. The investigation officer asked the SPSO whether it wished to apply the exemption in section 39(2) of FOISA to any such withheld information and to provide submissions on any exception(s) under the EIRs that it considered applicable. The investigating officer also pointed out that some of the information being withheld from LTRAG appeared to be already in LTRAG's possession, and asked the SPSO whether it was now prepared to explain this to LTRAG and to clarify to LTRAG which information was already in its possession.
11. The SPSO responded on 10 October 2013. The SPSO agreed that some of the information sought by LTRAG comprised environmental information which it would have been appropriate to have considered under the EIRs. The SPSO stated that such information was excepted from disclosure in terms of regulation 10(5)(d) of the EIRs and provided submissions on its application of this exception.
12. The SPSO subsequently contacted LTRAG and explained that some information which it had requested was already in its possession. The SPSO provided LTRAG with a list of the relevant information.
13. In further correspondence, the SPSO applied the exemption in section 39(2) of FOISA to any withheld information which comprised environmental information.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both LTRAG and the SPSO. She is satisfied that no matter of relevance has been overlooked.



FOISA or EIRs?

15. In this case, the SPSO has considered LTRAG's request as one which partially seeks environmental information in terms of the EIRs. Environmental information is defined in regulation 2(1) of the EIRs (the relevant parts of the definition are reproduced in the Appendix to this decision). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
16. Having considered the nature of the withheld information, the Commissioner is satisfied that at least some of it comprises environmental information as defined within regulation 2(1) of the EIRs. The relevant information in question concerns matters relating to a planning development. 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).
17. Having drawn this conclusion, the Commissioner must conclude that, by initially failing to consider and respond to LTRAG's request in terms of the EIRs, insofar as it related to environmental information, the SPSO failed to comply with regulation 5(1) and (2)(b) of the EIRs.

Section 39(2) of FOISA – environmental information

18. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1)) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. During the investigation, the SPSO stated that it wished to apply the exemption in section 39(2) to the information requested by LTRAG. In this case, the Commissioner accepts that the SPSO was entitled to apply the exemption to the requested environmental information, given her conclusion that it is properly classified as environmental information.
19. 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 (insofar as it concerns environmental information) in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.
20. As the withheld information in this case comprises both environmental and non-environmental information, the Commissioner is required to consider the SPSO's handling of the request in terms of both FOISA and the EIRs.



Section 26(a) of FOISA – prohibitions on disclosure (non-environmental information)

21. Section 26(a) of FOISA exempts information under FOISA where disclosure of the information is prohibited by or under any enactment. This is an absolute exemption in that it is not subject to the public interest test set down in section 2(1)(b) of FOISA. In this case, the SPSO argued that such a prohibition was created by section 19 of the SPSO Act.
22. Section 19(1) of the SPSO Act provides that information obtained by the Ombudsman or any of the Ombudsman's advisers in connection with any matter in respect of which a complaint or a request has been made must not be disclosed except for a limited range of purposes specified elsewhere in that section. These purposes do not include disclosure of information under FOISA.
23. The Commissioner accepts that section 19(1) of the SPSO Act creates a prohibition on disclosure of information that engages section 26(a) of FOISA. Section 19(1) of the SPSO Act clearly identifies that the prohibition on disclosure relates to information "obtained" by the Ombudsman or any of his advisers in connection with any matter in respect of which a complaint or a request has been made.
24. Having given full consideration to the information withheld in this case, the Commissioner is satisfied that the information under consideration was obtained by the SPSO during its investigation of a complaint and is information to which section 19 of the SPSO Act applies. She is satisfied that disclosure of this information under FOISA would be inconsistent with the prohibition in section 19 of the SPSO Act. Consequently, she is satisfied that the information is subject to the prohibition on disclosure contained in section 19 of the SPSO Act.
25. The Commissioner therefore considers that the SPSO was entitled to apply the exemption in section 26(a) of FOISA to withhold all of the non-environmental information sought by LTRAG.

Regulation 10(5)(d) – confidentiality (environmental information)

26. Regulation 10(5)(d) 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.
27. As with all of the 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)).
28. The first matter to be addressed by the Commissioner, therefore, is whether the information relates to proceedings of the SPSO, the confidentiality of which is protected by law. She must then consider whether disclosure of the information would, or would be likely to, prejudice that confidentiality substantially.



29. In its submissions, the SPSO argued that the proceedings envisaged by this exception include those where an authority exercises its statutory decision making powers. The SPSO noted that provisions in the SPSO Act require investigations to be conducted in private, and prohibit disclosure. The SPSO submitted that this gives rise to an expectation on the part of those providing information to it that such information will be subject to a restriction on disclosure.
30. The SPSO submitted that the rationale behind the prohibition on disclosure in the SPSO Act was to allow the SPSO to carry out investigations in private. This was in order to protect those making complaints to the SPSO, those being investigated and those assisting the SPSO in carrying out investigations. It argued that the purpose of these provisions and the maintenance of confidentiality included not dissuading people from making complaints, encouraging frankness and openness on the part of those providing information, and giving effect to the reasonable expectation of confidentiality on the part of those submitting information to the SPSO. The SPSO stated that those who engage with its investigation process have an expectation that it will be conducted in private. Furthermore, its ability to meet those expectations was crucial to the effective function of the complaints investigation process.
31. In the Commissioner's view, the information under consideration is clearly related to proceedings of the SPSO, and the confidentiality of that information is protected by law by virtue of the prohibition on disclosure contained in section 19 of the SPSO Act.
32. The Commissioner will therefore go on to consider whether disclosure of the information would have prejudiced substantially, or would have been likely to prejudice substantially, the confidentiality of the proceedings of the SPSO in terms of regulation 10(5)(d) of the EIRs.
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 information was provided to the SPSO in confidence with an expectation that the information would be used by the SPSO to carry out an investigation in private. The Commissioner considers that the disclosure of such information would discourage people from submitting complaints to the SPSO and would deter frankness and openness by parties involved in the investigation.
34. In the circumstances, given the nature of the information, the Commissioner accepts that making it available would have caused, or would have been likely to cause, substantial prejudice to the confidentiality of the SPSO's proceedings. Consequently, the Commissioner accepts that the exception in regulation 10(5)(d) applies to the environmental information under consideration.
35. The Commissioner must now consider, as required by regulation 10(1)(b), whether the public interest in making the information available is outweighed by the public interest in maintaining the exception.



The public interest test

36. The SPSO submitted that there was a public interest in allowing organisations under investigation to provide information to the SPSO in confidence, and that disclosure of such information might undermine the relationship between the SPSO and the public authorities it investigates. In the SPSO's view, authorities could be discouraged from cooperating fully and frankly for fear of public dissemination of information provided by them. This would undermine the SPSO's ability to conduct further investigations, which would not be in the public interest. The SPSO also argued that, where there is a public interest in the public being aware of SPSO investigations, the SPSO publishes this information, for example by publishing its findings on its website.
37. The Commissioner accepts the public interest arguments put forward by the SPSO in support of the information being withheld. In the Commissioner's view, it is in the public interest that the SPSO should be able to receive information in confidence during an investigation in order that it can conduct a comprehensive investigation. The Commissioner considers it is in the public interest that parties involved in an investigation can communicate freely with the SPSO in order to allow the SPSO to reach an equitable decision on the complaints it receives. The Commissioner is unable to identify any public interest arguments of substance in support of this particular information being disclosed. In all the circumstances, therefore, the Commissioner concludes that the strong public interest in maintaining the exception outweighs any public interest that exists in making the information available, and therefore is satisfied that the information was properly withheld under regulation 10(5)(d).

Advice and assistance

38. Section 15 of FOISA and regulation 9 of the EIRs provide that Scottish public authorities should provide advice and assistance to requesters so far as it would be reasonable to expect them to do so.
39. As noted above, the Commissioner has accepted that the information sought by LTRAG is exempt from disclosure under section 26(a) of FOISA, or excepted from disclosure under regulation 10(5)(d) of the EIRs. She also notes that some of the information sought by LTRAG was already in its possession. During the investigation, the SPSO informed LTRAG of this and provided a list of the relevant information.
40. In its submissions to the Commissioner, the SPSO acknowledged that, in the light of its duty to provide advice and assistance, it would have been appropriate to have explained to LTRAG that it already possessed some of the information covered by the request.

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41. The Commissioner has considered the guidance on the types of advice and assistance suggested in the Section 60 Code². Paragraph 1.10 of the Section 60 Code provides that *“the duty to provide advice and assistance does not extend to providing additional information which falls outside the scope of the information request, or locating information held by other public authorities. However, in some situations it may be helpful to provide some form of clarification or context to their response to avoid the information disclosed being misunderstood or misinterpreted”*.
42. In this instance, the Commissioner agrees that it would have been helpful had the SPSO informed LTRAG that some of the information sought in the request was already in its possession. By failing to do so, the Commissioner has concluded that the SPSO failed to comply fully with the duty in section 15(1) of FOISA and regulation 9(1) of the EIRs to provide reasonable advice and assistance to LTRAG in relation to its request. Given that the SPSO provided such advice and assistance during the investigation, the Commissioner does not require the SPSO to take any further action.

DECISION

The Commissioner finds that the Scottish Public Services Ombudsman (the SPSO) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Livingstone Terrace Residents Action Group (LTRAG).

The Commissioner finds that by failing to identify and respond to LTRAG’s information request as one partially seeking environmental information as defined in regulation 2(1) of the EIRs, the SPSO breached regulations 5(1) and (2)(b) of the EIRs.

The Commissioner finds that the SPSO was entitled to withhold the environmental information sought by LTRAG under the exception in regulation 10(5)(d) of the EIRs. The Commissioner finds also that the SPSO was entitled to withhold the remaining information under the exemption in section 26(a) of FOISA.

However, in failing to provide adequate advice and assistance to LTRAG, the SPSO failed to comply with section 15(1) of FOISA and regulation 9(1) of the EIRs. Given that the SPSO has now provided appropriate advice and assistance to LTRAG, the Commissioner does not require the SPSO to take any action in response to this decision notice.

² <http://www.scotland.gov.uk/Resource/Doc/933/0109425.pdf>



Appeal

Should either Livingstone Terrace Residents Action Group or the Scottish Public Services Ombudsman 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
19 December 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 –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (b) section 26;

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

...



26 Prohibitions on disclosure

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)-

- (a) is prohibited by or under an enactment;

...

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.

...

9 Duty to provide advice and assistance

- (1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...

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-

...

- (d) the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law; ...



Scottish Public Services Ombudsman Act 2002

19 Confidentiality of information

- (1) Information obtained by the Ombudsman or any of the Ombudsman's advisers in connection with any matter in respect of which a complaint or a request has been made must not be disclosed except for any of the purposes specified in subsection (2) or as permitted by subsection (3).
- (2) Those purposes are—
 - (a) the purposes of—
 - (i) any consideration of the complaint or request (including any statement under section 11),
 - (ii) any investigation of the matter (including any report of such an investigation),
 - (b) the purposes of any proceedings for—
 - (i) an offence under the Official Secrets Acts 1911 to 1989 alleged to have been committed in respect of information obtained by the Ombudsman,
 - (ii) an offence of perjury alleged to have been committed in the course of any investigation of the matter,
 - (c) the purposes of an inquiry with a view to the taking of any of the proceedings mentioned in paragraph (b),
 - (d) the purposes of any proceedings under section 14.
- (3) Where information referred to in subsection (1) is to the effect that any person is likely to constitute a threat to the health or safety of individuals (in particular or in general), the Ombudsman may disclose the information to any person to whom the Ombudsman thinks it should be disclosed in the interests of the health or safety of the particular individuals or, as the case may be, individuals in general.
- (4) In relation to information disclosed under subsection (3), the Ombudsman must—
 - (a) where the Ombudsman knows the identity of the person to whom the information relates, inform that person of the disclosure of the information and of the identity of the person to whom it has been disclosed, and
 - (b) inform the person from whom the information was obtained of the disclosure.



- (4A) The duty under subsection (4)(a) to inform a person about the identity of a person to whom information has been disclosed does not apply where informing the other person is likely to constitute a threat to the health or safety of the latter person.
- (5) It is not competent to call upon the Ombudsman or the Ombudsman's advisers to give evidence in any proceedings (other than proceedings referred to in subsection (2)) of matters coming to the knowledge of the Ombudsman or advisers in connection with any matter in respect of which a complaint or request has been made.
- (6) A member of the Scottish Executive may give notice in writing to the Ombudsman with respect to—
- (a) any document or information specified in the notice, or
 - (b) any class of document or information so specified,
- that, in the opinion of the member of the Scottish Executive, the disclosure of the document or information, or of documents or information of that class, would be contrary to the public interest.
- (7) Where such a notice is given nothing in this Act is to be construed as authorising or requiring the Ombudsman or any of the Ombudsman's advisers to communicate to any person or for any purpose any document or information specified in the notice, or any document or information of a class so specified.
- (8) Information obtained from -
- (a) the Information Commissioner by virtue of section 76 of the Freedom of Information Act 2000 (c.36)
 - (b) the Scottish Information Commissioner by virtue of section 63 of the Freedom of Information (Scotland) Act 2002 (asp 13),
- is to be treated for the purposes of subsection (1) as obtained in connection with any matter in respect of which a complaint or request has been made.
- (9) In relation to such information, subsection (2)(a) has effect as if—
- (a) the reference in sub-paragraph (i) to the complaint or request were a reference to any complaint or request, and
 - (b) the reference in sub-paragraph (ii) to the matter were a reference to any matter.
- (10) In this section and section 20 references to the Ombudsman's advisers are to persons from whom the Ombudsman obtains advice under paragraph 10 of schedule 1.