



Decision Notice 036/2024

Development on banks of Loch Lomond

Authority: Scottish Enterprise

Case Ref: 202101181

Summary

The Applicant asked the Authority for the full agreement reached between the Authority and Flamingo Land Ltd relating to a proposed development on the banks of Loch Lomond. The Authority disclosed some information and withheld the remainder, claiming that disclosure would prejudice substantially commercial confidentiality. The Commissioner investigated and found that the Authority correctly withheld the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “the applicant”, “the Commissioner” and “environmental information”) (Interpretation); 5(1) (Duty to make environmental information available on request); 10(1), (2) and 5(e) (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

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 16 March 2021, the Applicant made a request for information to the Authority. The Applicant asked for the full agreement reached (including any supplementary documents or appendices) between the Authority and Flamingo Land Ltd, as described in the Authority’s

press release of 22 December 2020, relating to a proposed development on the banks of Loch Lomond.

2. The Authority responded on 26 April 2021. The Authority confirmed it held information within the scope of the Applicant's request and provided some of it, but withheld the remainder under regulations 10(5)(e) (confidentiality of commercial or industrial information) and 11(3A)(a) (personal data) of the EIRs. The Authority also explained that it did not consider there to be a public interest in releasing information which could have an adverse effect on its commercial interests and those of third parties.
3. On 22 June 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he considered the Authority's use of the exception under regulation 10(5)(e) to be excessive and it was difficult to see why, for example, the whole list of suspensive conditions in the missives could be said to affect commercial interests. The Applicant also disputed the Authority's position that it had commercial interests itself and argued that, as a public authority, it should not have commercial interests as such. (The Applicant did not contest the redactions made under regulation 11(3A)(a) (personal data) of the EIRs.)
4. The Authority notified the Applicant of the outcome of its review on 21 July 2021, fully upholding its original decision. The Authority maintained that the information was commercially sensitive, and that disclosure would substantially prejudice its own commercial interests and those of Flamingo Land Ltd, through breaching its obligation of confidentiality and through diminishing its links with private sector partners and customers, neither of which was in the public interest. The Authority also explained that the Enterprise and New Towns (Scotland) Act 1990 establishes its obligation to obtain best value in relation to properties within its portfolio.
5. On 20 September 2021, the Applicant wrote to the Commissioner, applying 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. The Applicant stated he was dissatisfied with the outcome of the Authority's review for the same reasons he raised in his request for review.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 26 October 2021, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was subsequently 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 Authority was invited to comment on this application and to answer specific questions. These related to the reasons for applying the exception in regulation 10(5)(e), why the whole list of suspensive conditions could be said to affect commercial interests, the public interest in withholding the information and why the Authority referred to itself as having commercial interests.

9. During the course of the investigation, following a fresh review of the withheld information, the Authority disclosed some information to the Applicant which had previously been redacted. The Authority explained that due to the passage of time it was content to disclose the information to the Applicant.

Commissioner's analysis and findings

10. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority, including all of the information which was withheld following the Authority's response to the request for review.

Application of the EIRs

11. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs (paragraphs (a) and (c) of the definition of "environmental information"). The information relates to a proposed development on the banks of Loch Lomond.
12. The Applicant has not disputed the Authority's handling of the request under the EIRs, and the Commissioner will consider the information solely in terms of the EIRs in what follows.

Regulation 5(1) and 2(b) of the EIRs – Duty to make available environmental information on request

13. Regulation 5(1) of the EIRs 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 the request.
14. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulation 6 to 12 applies (regulation 5(2)(b)).
15. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.

Regulation 10(5)(e) of the EIRs – Confidentiality of commercial or industrial information

16. Regulation 10(5)(e) 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 confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
17. The Aarhus Convention: An Implementation Guide¹, which offers guidance on the interpretation of the Convention from which the EIRs derived, notes (at page 88) that the first test for considering this exception is whether national law expressly protects the confidentiality of the withheld information. The law must explicitly protect the type of information in question as commercial or industrial secrets. Secondly, the confidentiality must protect a "legitimate economic interest": this term is not defined in the Convention, but its meaning is further considered below (at paragraph 42).

¹ [The Aarhus Convention: An Implementation Guide \(unece.org\)](http://unece.org)

18. Having taken this guidance into consideration, the Commissioner's view is that, before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
- (i) Is the information publicly available?
 - (ii) Is the information industrial or commercial in nature?
 - (iii) Does a legally binding duty of confidence exist in relation to the information – express or implied?
 - (iv) Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

The Authority's submissions about the exception

Is the information publicly available?

19. The Authority stated the content of the missives is not publicly available.

Is the information commercial or industrial in nature?

20. The Authority explained the information requested comprises the content of concluded missives pertaining to a property transaction and was, therefore, commercial in nature.

Does a legally binding duty of confidence exist in relation to the information?

21. The Authority stated that the missives contain a confidentiality clause, but recognised that this alone that did not create a legally binding duty of confidence. However, the Authority considered that the following relevant criteria at common law would be fulfilled:

- the necessary quality of confidence, and
- the obligation to maintain confidentiality.

22. Regarding the first criterion, the Authority recognised that the existence of an agreement between itself and Flamingo Land Ltd was in the public domain, but the detailed legal missives were not. The Authority explained that the missives were developed under circumstances from which it should reasonably have been inferred their content was produced on a commercial in-confidence basis. The Authority therefore considered that the information has the necessary quality of confidence.

23. Regarding the second criterion, the Authority stated the information was received under an implicit and explicit obligation to maintain confidentiality of the details of the missives. The Authority noted this expectation is normal legal practice in such transactions.

Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

24. The Authority stated that the transaction between it and Flamingo Land Ltd is “live and ongoing”, with a number of suspensive conditions in the agreement. The Authority further explained that the implementation of proposals within the missives can only proceed with the granting of planning permission, a process which is live and ongoing.²

² <https://www.lochlomond-trossachs.org/planning/planning-applications/major-planning-applications/west-riverside-woodbank-house/>

25. Given this, the Authority stated there is a risk of substantial prejudice to its economic interests were the complete missives disclosed at this time: for example, the details of the types of, or how it calculates, abnormal costs, deductions or allowances for one site or building, could be used by a prospective purchaser of another site or building elsewhere in its portfolio to negotiate down the price.
26. The Authority further submitted that disclosure of the information requested would be detrimental to the general public interest in confidences being maintained, cause likelihood of commercial damage to Flamingo Land Ltd through disclosure of sensitive information and create a possibility that Flamingo Land Ltd's competitors could analyse and identify the risk profile assumed by both it and Flamingo Land Ltd to the future detriment of both.
27. The Authority also noted that, while property sale prices generally become public domain a few months after a transaction settles, the method of calculation of that price is not released to the public and instead remains its commercial information.
28. In response to the Applicant's view that as a public authority, the Authority should not have commercial interests as such, the Authority explained that it has a very distinctive role amongst other public bodies, within Scotland and strategically as part of the Scottish economy.
29. The Authority commented that it was established as a non-departmental public body of the Scottish Government, with specific public functions laid down in the Enterprise and New Towns (Scotland) Act 1990, and to deliver those functions it is required as a matter of necessity to work with, support and operate alongside a range of private sector entities. The effective operation of the Authority requires those public sector entities to be able to share commercial or sensitive information with it, within a private space where required.
30. The Authority set out a number of the functions it fulfils including; the provision of finance to persons intending to carry on industrial undertakings, promoting the private ownership of interests in industrial undertakings by the disposal of securities and other property held by itself, or any of its subsidiaries, and otherwise promoting or assisting the establishment, growth, modernisation or development of industry or any undertaking in an industry.
31. The Authority noted that in addition to land transactions, its commercial interests include its ability to work, in a meaningful way with companies in Scotland to explore investment opportunities and deliver its functions under the 1990 Act. This also includes engaging in commercial activities in its own right, leverages in private sector investment and the generation of significant income from its investment portfolio.
32. The Authority argued that it cannot conduct its functions effectively and seek best value in its investments or land transactions if it does not pay due attention to the commercial considerations of those activities.

The Applicant's submissions about the exception

33. The Applicant disagreed with the Authority's use of the exception as he thought it had been applied too broadly. Specifically, the Applicant stated that it had been applied to whole sections of the agreement and it was difficult to see why, for example, the whole list of the suspensive conditions could be said to affect commercial interests and that the extent of the redactions was such that no reasonable person could tell whether they relate to commercial matters or not.

34. The Applicant also argued that the Authority should not have commercial interests, as such, of its own, and it should not have applied the argument that disclosure of the withheld information would harm its economic interests.

The Commissioner's view about the exception

Is the information publicly available?

35. Based on the submissions from the Authority, and commercial missives generally being confidential, the Commissioner is satisfied that the information is not publicly available.

Is the information commercial or industrial in nature?

36. As the information requested comprises the content of concluded missives pertaining to a property transaction, the Commissioner is satisfied it is commercial in nature.

Does a legally binding duty of confidence exist in relation to the information?

37. In the Commissioner's view, confidentiality "provided for by law" will include confidentiality imposed on any person under the common law of confidence, under a contractual obligation or by statute. For a duty of confidence to be owed under the common law, it is necessary for certain criteria to be met. These are:

(i) the information must have the necessary quality of confidence about it. It must not be generally accessible to the public already.

(ii) the information must have been communicated in circumstances importing an obligation of confidentiality. The obligation may be express (for example, in a contract or other agreement), or implied from the circumstances or the nature of the relationship between the parties; and

(iii) unauthorised use or disclosure of the information would be to the detriment of the party communicating it. Detriment may be potential rather than actual and need not be financial.

38. Regarding point (i), the Commissioner accepts that the information requested is not generally accessible to the public, will only have been viewed by a limited number of individuals and was clearly received under circumstances from which it would reasonably have been inferred it was confidential.

39. Regarding point (ii), the Commissioner accepts that the Authority received the information in circumstances which imposed an obligation on it to maintain confidentiality, with the missives containing an explicit clause of confidentiality and it being normal legal practice to expect confidentiality in such transactions.

40. Regarding point (iii), the Commissioner accepts that the potential harm the Authority outlined at paragraph 25 that it considered would result from disclosure of the withheld information.

41. The Commissioner is therefore satisfied a legally binding duty of confidence exists in relation to the information.

Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

42. The term "legitimate interest" is not defined in the EIRs. In the Commissioner's view, the interest in question should be financial, commercial or otherwise economic in nature. The prejudice to that interest must be substantial: in other words, it must be of real and of demonstrable significance.

43. As noted above, the Applicant was not satisfied that the Authority had commercial interests in its own right. Having considered the submissions from the Authority, the Commissioner is satisfied that the Authority does have commercial interests in relation to the information contained in the "Offer to Grant Lease" document.
44. It is evident to the Commissioner from reading the "Offer to Grant Lease" document that this was prepared as part of the agreement between the Authority and Flamingo Land Ltd for the transaction relating to the provision of land at Loch Lomond.
45. Having considered the information that has been redacted from the "Offer to Grant Lease" document, the Commissioner accepts that disclosure of the information would have caused, or would be likely to cause, substantial prejudice to a legitimate economic interest.
46. The Commissioner recognises the point made by the Applicant that the Authority had an exclusivity agreement with Flamingo Land Ltd which means, by definition, there are no longer any relevant competitors and that disclosure of the information he requested would therefore not advantage competitors of Flamingo Land Ltd.
47. The Commissioner agrees that this agreement is likely to mitigate the risks of harm to the respective commercial interests of the Authority and Flamingo Land Ltd, but considers they would still exist if the withheld information was disclosed now: for example, while the risk of immediate competition is reduced, the possibility of competitors adjusting their strategies based on the disclosed information is not eliminated.
48. The Commissioner also notes that the status of the planning application for the proposed development remains live and ongoing and accepts the information, including the suspensive conditions, remains commercially confidential and that premature disclosure would have a detrimental effect on proceedings.
49. The Commissioner is therefore satisfied disclosure of the information would, or would be likely to, prejudice substantially the confidentiality of commercial information where such confidentiality is provided for by law to protect a legitimate economic interest.

The public interest test – regulation 10(5)(e)

50. Having accepted that the exception in regulation 10(5)(e) applies to the withheld information, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs. This states that a Scottish 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.

The Authority's submissions about the public interest

51. The Authority noted that it has a duty to be open and transparent, but stated there cannot be a public interest in those duties operating to the detriment of its commercial interests and those of Flamingo Land Ltd through the release of commercially confidential information.
52. The Authority submitted that there is significant public interest in public bodies maintaining confidentiality and protecting the legitimate economic interests of commercial organisations where it has been agreed that information would be held confidentially.
53. The Authority explained that disclosure of the requested information would make it less able to fulfil its duty to obtain value for money through the management of contracts, sales and economic development projects in the future.

54. The Authority also noted that, under section 8(1)(g) of the Enterprise and New Towns (Scotland) Act, it has a statutory duty to obtain best value:

“in addition to any power exercisable under subsection (1)(f) of section 4 of this Act, holding land acquired by it and disposing of or otherwise dealing with such land, so however that, except with the consent of the Secretary of State (whether or not given by virtue of subsection (5) of that section) and subject to section 7(b) of this Act, **neither body shall dispose of land, or grant a lease of land, for a consideration less than the best that reasonably can be obtained**” (emphasis added)

55. The Authority concluded that the public interest in disclosure is therefore outweighed by the public interest in avoiding substantial harm to legitimate economic interests.

The Applicant's submissions about the public interest

56. The Applicant argued that, as the Authority is a public body with no commercial interests of its own, there should be a limited range of circumstances in which any commercial interests override the public interest.

57. The Applicant set out several arguments on why the public interest in the withheld information is wide-ranging:

- The agreement relates to the transfer of a large area of well-known and iconic land from the ownership of an accountable public body to ownership of a private company;
- There is a live planning application under consideration by Loch Lomond and the Trossachs National Park, which has drawn a record number of comments and received significant national media coverage and demonstrates the need for accurate information and transparency;
- Drumkinnon Woods, a large area of protected Ancient Woodland, initially formed part of the above planning application but was removed from the planned development following successful campaigning and more restrictive planning policy in National Planning Framework 4. This means the woods do not form part of the planning application but will still be sold to a private company, meaning the public cannot be certain of the threat to a well-loved and ecologically important woodland;
- The Authority claimed that the agreement is part of its obligation to maximise economic development benefit from sites it owns, but it is far from clear that such benefit exists with this agreement and more scrutiny would help demonstrate whether the Authority is fulfilling this duty;
- A number of local people have come together to put together a plan for a community buyout of the site and are forming an appropriate community business structure. However, the lack of clarity on the status of the land in question poses severe difficulties to them in forming their plans and a business case for community ownership.

The Commissioner's view on the public interest

58. The Commissioner accepts that there is a general public interest in transparency and accountability, particularly where this involves the transfer, and development, of a large area of well-known and iconic land from the ownership of an accountable public body to ownership of a private company.

59. The Commissioner also recognises the concerns that exist around the future of Drumkinnon Woods, although he notes that the Authority is not a body with a remit for nature conservation and that access rights should be unaffected by ownership.
60. However, the Commissioner must also take into account the harm he has identified above, and his acceptance that the information was provided in confidence. There is a clear public interest in confidences not being breached.
61. The Commissioner notes the Authority's statutory duty to obtain best value, which he agrees there is public interest in the Authority achieving and which would be made more difficult if the information requested were to be disclosed now.
62. The Commissioner also takes account of the live nature of the planning process (which is transparent and should address any legitimate concerns about the nature of the development proposals).
63. Having carefully considered the public interest arguments put forward by both the Applicant and the Authority, the Commissioner has concluded that the public interest in making the information available is, on balance, outweighed by the public interest in maintaining the exception in regulation 10(5)(e) of the EIRs.
64. The Commissioner is therefore satisfied that the Authority was, and is, entitled to withhold the information under regulation 10(5)(e).

Decision

The Commissioner finds that the Authority complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or the Authority 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.

David Hamilton
Scottish Information Commissioner

19 March 2024

Appendix 1: 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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (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 –
 - ...
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- ...

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.
- ...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
 - (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -

- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
- (b) state the name of the applicant and an address for correspondence; and
- (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);
and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

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

“applicant” means any person who requests that environmental information be made available;

“the Commissioner” means the Scottish Information Commissioner constituted by section 42 of the Act;

...

“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.

...

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-

...

- (e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;

...

17 Enforcement and appeal provisions

- (1) The provisions of Part 4 of the Act (Enforcement) including schedule 3 (powers of entry and inspection), shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in paragraph (2).

- (2) In the application of any provision of the Act by paragraph (1) any reference to -

- (a) the Act is deemed to be a reference to these Regulations;
- (b) the requirements of Part 1 of the Act is deemed to be a reference to the requirements of these Regulations;

...

- (f) a notice under section 21(5) or (9) (review by a Scottish public authority) of the Act is deemed to be a reference to a notice under regulation 16(4); and

...