



Scottish Information
Commissioner
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Decision Notice 113/2023

Business case for proposed “Energy Transition Zone” near to Aberdeen South Harbour

Applicant: The Applicant

Authority: Aberdeen City Council

Case Ref: 202101306

Summary

The Applicant asked the Authority for any business case held relative to the proposed “Energy Transition Zone” suggested for land around Aberdeen South Harbour. The Authority provided some information during the investigation and withheld the remainder, claiming it was commercially confidential. The Commissioner investigated and found that the Authority correctly withheld the information. The Commissioner also found that the Authority failed to respond to the request within the statutory timescale.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 10(1) (Time for compliance); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (a), (b) and (c) (definition of “the Act”, “the applicant”, “the Commissioner” and “environmental information”) (Interpretation); 5(1) and 2(2)(a) (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) and (b) (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 31 July 2021, the Applicant made a request for information to the Authority. She asked for information which included:

“Any document described as a ‘business case’ or similar held by you or on your behalf relative to the proposed ‘Energy Transition Zone’ suggested for land adjacent to or in the vicinity of the Aberdeen South Harbour”.
2. On 29 August 2021, the Applicant wrote to the Authority again, as she had received no response to her request.
3. On 31 August 2021 the Authority responded, apologising to the Applicant for its failure to respond within the statutory timescale and informing her that it hoped to provide a response within the next five working days. It informed her that, as it had failed to respond in the timescale set out in the legislation, she could ask for a review.
4. On 9 September 2021, the Authority apologised to the Applicant again for the delay in providing a response, and assured her that work was continuing to respond as soon as possible. The Authority informed the Applicant that she could ask for a review based on the Authority's failure to respond and that, if she did she could also request a review based on its response to her initial request.
5. On 12 September 2021, the Applicant wrote to the Authority, requesting a review of its failure to respond to her request.
6. The Authority notified the Applicant of the outcome of its review on 8 October 2021. It apologised again for its failure to provide a response to her request in the statutory timescale and provided a response. It refused the request for a “business case” or similar under the terms of regulation 10(5)(e) of the EIRs.
7. On 18 October 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 that she was dissatisfied with the outcome of the Authority's review for that part of her request relating to a “business case” or similar, because she did not agree that the exception applied, nor, if it did, that the public interest favoured withholding the information. The Applicant also expressed dissatisfaction at the failure of the Authority to provide a response to her request within the statutory timescale.

Investigation

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
9. On 24 November 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 allocated to an investigating officer.
10. 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 its reasons for applying regulation 10(5)(e) to the withheld information.

11. On 24 August 2022, the Authority provided the Applicant with some of the information she had requested, but withheld the remainder under regulation 10(5)(e). The Applicant confirmed to the investigating officer that she remained dissatisfied that much of the information was still being withheld.

Commissioner's analysis and findings

12. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Handling in terms of the EIRs

13. Having considered the terms of the request, it is clear that any information falling within the scope would be environmental information, as defined in regulation 2(1) of the EIRs. The information requested concerns plans for the development of an area of land. As these plans will impact upon the state of the land and landscape, the Commissioner is satisfied that the information falls within paragraphs (a) and (c) of that definition. The Applicant has not challenged the Authority's application of the EIRs in this case and so the Commissioner will consider the request in what follows solely in terms of the EIRs.
14. 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 a request.
15. 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 regulations 6 to 12 applies (regulation 5(2)(b)).
16. 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) – Confidentiality of commercial or industrial information

17. The Commissioner is considering in this decision only whether the Authority was correct to withhold the information falling within Part 1 of the Applicant's request (as set out in paragraph 1 above). (He will consider later in this decision the question of Authority's compliance with the statutory timescales.)
18. For Part 1, the Authority initially withheld information under regulation 10(5)(e) of the EIRs. The Applicant disagreed with the application of this exception, on the basis that she did not believe the exception had been correctly engaged and that – if it had – the public interest favoured disclosure of the information.
19. 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.
20. As with all of the exceptions contained within regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a))

and apply a presumption in favour of disclosure (regulation 10(2)(b)). As noted above, even where the exception applies, the information must be disclosed 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)).

21. The Aarhus Convention: An Implementation Guide¹, which offers guidance on the interpretation of the convention from which the EIRs are 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 that type of information as commercial or industrial secrets. Secondly, the confidentiality must protect a “legitimate economic interest”.
22. 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 commercial or industrial in nature?
 - (ii) Does a legally binding duty of confidence exist in relation to the information?
 - (iii) Is the information publicly available?
 - (iv) Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

Is the information commercial or industrial in nature?

23. The information withheld by the Authority is (as was requested) a business case. The Commissioner accepts the Authority’s submission that the business case was created using private funds (as opposed to public money) for a commercial company and relates to the potential development of an Energy Transition Zone adjacent to Aberdeen South Harbour.
24. The Commissioner is satisfied that this information can correctly be described as commercial in nature for the purposes of regulation 10(5)(e) of the EIRs. This does not appear to be disputed by the Applicant.

Does a legally binding duty of confidence exist in relation to the information, and is the information publicly available?

25. In the Commissioner’s view, confidentiality “provided by law” will include confidentiality imposed on any person under the common law of confidence, under a contractual obligation or by statute.
26. The Authority submitted that the document was clearly marked “Confidential – not for further circulation”, and that this made it evident that the third party had provided the information (the Business case) to it on a confidential basis and that an implied obligation of confidence was therefore created between the parties.
27. The Authority further highlighted that it held the information, not because it had asked for it, or that it had been formally submitted to it, but rather that its officers had supported some of the workstreams, and the information had been shared in that sense, on the understanding that the information would remain confidential and would not be shared with any third party.

¹ https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

28. The Authority confirmed that the third party, for whom the Business Case was created, had shared its view that it did not support disclosure of the document.
29. The Applicant submitted that the Authority had not argued any legal obligation of confidentiality, and stated that sensitivity of information did not automatically make it confidential. She acknowledged that the Authority had argued there was an implied level of confidence, but she did not consider that there was a legally binding implied term.
30. The Applicant suggested that, at the time the Authority had initially refused to provide her with the information she had requested, it had not consulted with the third party: she submitted that this occurred at a much later date. She argued that the Authority should not be able to rely on evidence gathered in May/June 2022 when the refusal took place in October 2021.
31. Although there is no evidence to suggest that there was an explicit obligation of confidentiality in place, the Commissioner notes that the information is only held by the Authority by virtue of its position. While the third party was not consulted on the request until after an application had been made to the Commissioner, the Commissioner is satisfied, from the circumstances in which the information was obtained by the Authority (well before that consultation), that the information in the business case was supplied under an implied obligation to maintain confidentiality.
32. Accordingly, the Commissioner is satisfied that an implied duty of confidence existed and applied to the withheld information, at the time the Authority responded to the Applicant's request and its requirement for review.

Is the information publicly available?

33. In its submissions, the Authority acknowledged that some of the information in the Business Case was in the public domain. It subsequently provided some information to the Applicant.
34. Having received that information (in the form of a redacted Business Case), the Applicant commented that the material provided comprised only publicly available information. She argued that any substantive data that would allow the reader to interrogate any of the figures, hypothesis etc. had been redacted.
35. The Applicant considered, after attending a public meeting on the matter and speaking to the Chief Executive of the third party, that data relative to job numbers that would be generated were not confidential, as the methodology for determining these numbers was taken from the Government's "Green Book" – which was in the public domain.
36. The Authority confirmed that no further elements of the remaining withheld information were in the public domain.
37. The Commissioner accepts the Authority's position that the remaining withheld information is not in the public domain. He acknowledges that the Authority disclosed information, already in the public domain, that it had previously withheld. The Commissioner must therefore find that the Authority wrongly withheld this information under regulation 10(5)(e). (He does not require the Authority to take any action in respect of this information, as it has now provided this information to the Applicant.) The remaining information – as it appears in the Business case – is information that was not (as far as the Commissioner can discern) in the public domain at the time of the request or review.

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

Submissions from the Authority – regulation 10(5)(e)

38. In its review outcome, the Authority argued that the business case contained sensitive information, including financial details, site-specific information and commercial information in terms of the plan and potential inward investment, and that disclosure of the withheld information would give competitors an advantage, to the disadvantage of the third party.
39. The Authority also argued that disclosure of the information and any (consequential) competitive advantage to a potential competitor would cause reputational damage to the Authority as a cooperating partner.
40. Responding to the Commissioner's investigation, the Authority submitted that disclosure of the withheld information would be detrimental to the economic interest of the third party who commissioned the report and others who produced it.
41. The Authority also believed that disclosure could have a direct effect on the continuation of the project, as it considered funding could be compromised.
42. The Authority expanded on its position, arguing that the document's structure should be withheld as commercially sensitive, as the business case was created by consultants commissioned by a third party and not by the Authority. The Authority argued that due to the "niche nature" of the work that these consultants do, disclosure would invalidate the commissioning of their work and detrimentally affect their opportunities to procure future work, by allowing competitors access to their work and how it was presented.

Submissions from the Applicant – regulation 10(5)(e)

43. The Applicant believed the Authority initially stated that it was its own commercial interests that would be harmed in invoking this exception, and only referred indirectly to a third party. Her view was that the Authority then changed its position to refer to the third party's commercial interests being harmed by disclosure and that, on this basis alone, the information should be disclosed.
44. The Applicant further stated that the Authority had not provided, in its initial response, any detailed argument on economic interest, but rather argued in very generic and speculative terms. She did not believe the third party's position could be taken into account, given that the third party had not been consulted when the Authority was dealing with the request.
45. The Applicant did not consider that the Authority had provided a strong or detailed enough argument that disclosure of the withheld information would cause the harm claimed.

The Commissioner's view on substantial prejudice

46. The Commissioner has considered the submissions of the Authority, the Applicant and the views of the third party who commissioned the Business Case. He notes the Applicant's concerns about the detail provided by the Authority in its reasoning, and he would acknowledge that more detailed reasons might have assisted here. However, he must take into account all submissions provided by the Authority and cannot ignore those provided during his investigation.
47. In all the circumstances, the Commissioner accepts the Authority's position that at the time of the request (or that of the review, at the latest – he cannot consider the position at any later point), disclosure of the remaining information in the Business Case would have given

competitors an insight into the third party's commercial plans and therefore a commercial advantage. The Commissioner accepts that this would have placed the third party, and those commissioned to prepare the Business Case, at a disadvantage, thereby causing substantial prejudice to their commercial interests.

48. The Commissioner accepts that disclosure of this information could provide potential competitors with useful insights and potential leverage, and also highlight key areas of risk or interest which could be translated into commercial gain.
49. The Commissioner is therefore satisfied that the disclosure of this information would have caused, or been likely to cause, substantial prejudice to a legitimate economic interest. Consequently, he is satisfied that the Authority was entitled to apply the exception in regulation 10(5)(e) of the EIRs to the information remaining withheld.
50. As the Commissioner is satisfied that disclosure of the information, in response to the Applicant's request or requirement for review, would have caused, or would have been likely to, cause substantial harm to a legitimate economic interest and is therefore satisfied that the exception was correctly applied to that information, he must go on to consider the public interest test.

The Public interest test

51. Having accepted that the exception in regulation 10(5)(e) applies to the information, the Commissioner must consider the public interest test in regulation 10(1)(b) of the EIRs. This specifies that a Scottish public authority may only withhold information to which an exception applies where, in all circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

The Authority's submissions on the public interest

52. The Authority acknowledged that there was a public interest in the development of renewable energy sources and in ensuring that public money (if used on this project) was spent fairly and to the best value to meet this goal. The Authority also commented that it understood the public would have concerns about the change of use of land (public park) and the effect this would have on their local area and community. (It stated that the third party was committed to engaging with the community to discuss these issues.) The Authority also highlighted its view that these matters were only partly addressed within the withheld information.
53. The Authority focused on the commercial nature of the information within the Business Case and that it concerned the affairs of a private company, and the impact disclosure might have on potential investment. The Authority considered that disclosing this information at this time might prevent it from delivering a successful publicly-funded project that would benefit the community in the long term.
54. On balance, the Authority considered the public interest favoured withholding the information.

The Applicant's submissions on the public interest

55. The Applicant did not agree with the Authority's arguments concerning the public interest. She believed that there was a real risk that "greenbelt land and a loved park would be lost to make way for industrial land" (which would, she submitted, be left derelict if companies did not invest). The Applicant suggested that these factors made it all the more important that the community had access to information, to "interrogate the economic argument" and hold representatives to account.

The Commissioner's view on the public interest

56. The Commissioner has already concluded that disclosure of this information would be likely to cause substantial prejudice to a legitimate economic interest, and has also found an implied duty of confidence in relation to the remaining withheld information. As he has recognised in previous cases, there is a strong public interest in maintaining confidentiality where that confidentiality is provided for by law.
57. The Commissioner also recognises that there is considerable public interest in transparency and public scrutiny in relation to how public authorities make decisions, particularly environmental decisions and the change of use of green spaces. Disclosure in this case would partially contribute to the public's understanding of the issues in question, and the factors taken into account by the third party, including the economic arguments that might factor in the balance against any loss of amenity.
58. On the other hand, the Commissioner would observe that the Business Case has little to say of direct relevance to the issues of loss of amenity highlighted by the Applicant – and that there would be other fora, including the development planning process, for public engagement with these issues. He also notes the particular circumstances in which the Business Case was received by the Authority, and the importance of it – as the local authority – being aware of (and able to input to) proposals such as this from an early stage, in the public interest (while acknowledging that there may also be a real public interest in alternative points of view being advanced from the community).
59. The Commissioner has considered carefully all the public interest arguments he has received. He must consider whether the Authority was correct in its decision, at the time it responded to the request and subsequent requirement for review. That position may change in time, but the issue here is whether the Authority responded to this particular request correctly at the relevant time. It is important for all involved to appreciate that the sensitivity of information – and the balance of public interest considerations – may alter over time, and information that may have been properly withheld at one point in time may be capable of disclosure at another.
60. There are clearly arguments of substance on both sides here, and the Commissioner finds the public interest to be relatively finely balanced. In all of the circumstances of the case, however, the Commissioner finds that the public interest in maintaining the exception outweighed that in making the information available, at the time the Authority responded to the Applicant's request and requirement for review. He therefore concludes that the Authority was entitled to withhold the information under regulation 10(5)(e) of the EIRs.

Handling of the request – responding within statutory timescales

61. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of a request to comply with a request for information. This subject to qualifications which are not relevant in this case. The same timescale is laid down by regulation 5(2)(a) of the EIRs.
62. It is a matter of fact that the Authority did not provide a response to the Applicant's request for information within 20 working days, so the Commissioner must find that it failed to comply with section 10(1) of FOISA and regulation 5(2)(a) of the EIRs.
63. As the Authority has apologised to the Applicant, and subsequently provided a response to the Applicant's requirement for a review, the Commissioner does not require any further action to be taken in this regard.

Decision

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

The Commissioner finds that, by withholding information falling within the scope if the request under regulation 10(5)(e) of the EIRs, the Authority complied with the EIRs.

However, the Commissioner finds that the Authority was not entitled to withhold the information it subsequently disclosed during the investigation and that, by doing so, it failed to comply with regulation 5(1) of the EIRs. In failing to respond to the request within the required timescale, it also failed to comply with regulation 5(2)(a) of the EIRs (and section 10(1) of the Freedom of Information (Scotland) Act 2002).

Given that this information was provided to the Applicant during the investigation, and a response was provided to the Applicant on request for review, the Commissioner does not require the Authority to take any action in respect of these failures, in response to the Applicant's application.

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.

**Euan McCulloch
Head of Enforcement**

27 November 2023

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.

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after—
 - (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
 - ...

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 –

“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;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);

(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)-

(a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and

...

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
- ...