

Decision 230/2006 Messrs McIntosh and Aberdeen City Council

Agricultural Assessment for part of Aberdeen Western Peripheral Route (AWPR)

**Applicant: Messrs McIntosh
Authority: Aberdeen City Council
Case No: 200502963
Decision Date: 11 December 2006**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 230/2006 – Messrs McIntosh and Aberdeen City Council

Request for Agricultural Assessment for part of Aberdeen Western Peripheral Route (AWPR) - withheld under regulation 10(4)(d) of the EIRs

Relevant Statutory Provisions and other Sources

Environmental Information (Scotland) Regulations 2004: regulations 2 (Interpretation), 5 (Duty to make available environmental information on request); 10(1)(b), 10(2) and 10(4)(d) (Exceptions from duty to make environmental information available)

The full text of each of the above provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Scottish Executive Environment Group Access to Environmental Information Guidance for Scottish Public Authorities and Interested Parties on the Implementation of the Environmental Information (Scotland) Regulations 2004 paragraphs 79 – 81

Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Environmental Information (Scotland) Regulations 2004 paragraph 27

Maile v Wigan Metropolitan Borough Council [2001] Env L R 11

Facts

Paull & Williamsons, Solicitors on behalf of their clients Messrs McIntosh made a request to Aberdeen City Council (the Council) for “the Agricultural Assessment on Individual Farm Units which is contained in part of the Stage 2 Assessment of the Report entitled ‘Response to Messrs McIntosh Consultation’.”

The Council refused to supply this information on the grounds of regulation 10(4)(d) of the Environmental Information (Scotland) Regulations 2004 (the EIRs).

Following an investigation, the Commissioner found that the information was not exempt in terms of regulation 10(4)(d) of the EIRs and that the Council had therefore not dealt with Messrs McIntosh’s request for information in accordance with regulation 5(1) of the EIRs.



Background

1. On 17 August 2005, Paull & Williamsons, Solicitors (Paull & Williamsons) made a request on behalf of their client Messrs McIntosh to the Council for “the Agricultural Assessment on Individual Farm Units which is contained in part of the Stage 2 Assessment of the Report entitled ‘Response to Messrs McIntosh Consultation’.”
2. The Council issued a refusal notice on 14 September 2005 to Paull & Williamsons, stating that the material was still in the course of completion and was therefore excepted under regulation 10(4)(d) of the EIRs. The Council stated that it was envisaged that the final version of the Environmental Assessment would be available to the public, as part of an Environmental statement, in January 2006.
3. Paull & Williamsons requested on 20 September 2005, on behalf of their clients, that a review under regulation 16 of the EIRs be carried out by the Council. Paull & Williamsons stated that, in terms of the exception in regulation 10(4)(d), it was the Environmental Assessment which was incomplete, not the Agricultural Assessment.
4. The review panel of the Council upheld, on 22 September 2005, the decision not to disclose the information on the ground of the exception quoted and communicated this to Paull & Williamsons by letter of 14 October 2005.
5. Paull & Williamsons were dissatisfied with this response and on 27 October 2005, on behalf of their clients, made an application to the Scottish Information Commissioner for a decision as to whether the Council had dealt with their information request in accordance with the EIRs. The case was allocated to an investigating officer and the application was validated by establishing that a valid information request had been made to a Scottish public authority and that an application had been made to the Commissioner only after asking the public authority to review its response to the request.



The Investigation

6. The investigating officer formally contacted the Council on 25 November 2005 in terms of section 49(3)(a) of the Freedom of Information (Scotland) Act 2002 (FOISA), which relates to investigations carried out under both the EIRs and FOISA, asking for its comments on the application and for the information in relation to this case. Following discussion (see below), the Council responded on 8 June 2006 with its comments and with a copy of the Report entitled "Response to Messrs McIntosh Consultation". Following further discussion, the Council responded on 7 August 2006 with the three documents which it stated were all that could be said to comprise the "Agricultural Assessment" requested by Messrs McIntosh, and which were physically held on its behalf by the Scottish Agricultural College ("the SAC").
7. This application related to a portion of land affected by the construction of the Aberdeen Western Peripheral Route (AWPR). The AWPR is a road being developed in and around Aberdeen and the North-east of Scotland. The road is being developed by Transport Scotland, in partnership with Aberdeen City Council and Aberdeenshire Council.
8. Messrs McIntosh had been provided with a report entitled "Response to Messrs McIntosh Consultation" by the Council's AWPR team. This report in turn referred to three stages of assessment, including an Agricultural Assessment on individual farm units. Part of the stage 2 assessment was undertaken by Jacobs Babbie Ltd ("Jacobs Babbie") on behalf of the Council's AWPR team.
9. The Council explained that the Agricultural Assessment was carried out by the SAC, as sub-consultant, on behalf of Jacobs Babbie. Jacobs Babbie had undertaken this stage 2 assessment on behalf of the Council. An Environmental Impact Assessment (EIA) for the AWPR has been undertaken in accordance with the requirements of the Environmental Impact Assessment (Scotland) Regulations 1999 ("the 1999 Regulations") and the guidance in the Design Manual for Roads and Bridges (DMRB) (Volume 3) for a stage 3 level of assessment. This assessment considers the potential impacts on land use (including agricultural land).



10. In accordance with section 49(4) of FOISA (which is also relevant to investigations carried out under the EIRs) my Office endeavoured to facilitate a settlement between the Council and Messrs McIntosh. On 2 March 2006, the Council supplied the applicant with certain information, including a "Summary of Findings" prepared by the SAC. However, Messrs McIntosh were not satisfied with this information, commenting that the provided information was extracted from information, and in turn referred to further information.
11. Paull & Williamsons requested, on behalf of their clients, Messrs McIntosh, that a decision be given on their application.

Submissions from the Council

12. The Council explained that there was no formal complete Agricultural Assessment, only notes in a file and that these notes were incomplete since the information was being provided by a sub-consultant (the SAC). The Council in its submissions emphasised that the information would be included in the EIA, which had an expected publication date of December 2006, initially quoted as January 2006.
13. The Council explained that the reassessment of aspects of the design route was ongoing and accordingly the Agricultural Assessment was not considered complete, since the final route was undecided. It explained that the timescales had changed following the publication of the Scottish Executive's decision on the line of the road in November 2005. The Council said that the final version of the Agricultural Assessment could not be published until the route had been finalised.
14. As will be discussed in more detail below, the exception contained in regulation 10(4)(d) of the EIRs is subject to the public interest test required by regulation 10(1)(b). In respect of the public interest, the Council stated that release of the information would hinder the lead consultant in the completion of the final route. The Council stated that release of the incomplete information would have a detrimental effect on the internal analysis and interpretation of the individual survey, would affect completion of the larger environmental statement and be detrimental to those with an economic interest in land lying along the five possible routes.
15. The Council stated that there was a formal process to deal with issues such as those being raised by Messrs McIntosh and advised that there is to be a public local inquiry when all information on the route choice would be available.



Submissions from the applicant

16. Paull & Williamsons, on behalf of their clients, stated that they had requested information, i.e. the Agricultural Assessment, and not the Environmental Assessment, or parts of that assessment (which had not been brought together). Accordingly, the exception quoted by the Council would properly apply to the Environmental Assessment, but not to the Agricultural Assessment which was separate. Paull & Williamsons argued that the Agricultural Assessment was complete and that it has no bearing on the Environmental Assessment.
17. On the interpretation of the exception, Paull & Williamsons referred me to regulation 10(2) of the EIRs which provides that, in considering the application of an exception, that exception should be interpreted in a restrictive way with a presumption in favour of disclosure.
18. The exception contained in regulation 10(4)(d) of the EIRs is subject to the public interest test required by regulation 10(1)(b). Paull & Williamsons submitted that this report should be released because it would increase the free and frank discussion of the AWPR, itself a matter of public interest. They disputed the view that release would hinder analysis, interpretation or amendment of the Environmental Assessment.

Commissioner's Findings and Analysis

19. The first question is to establish the information to which this request relates. The second is to decide whether that material comes within the exception in regulation 10(4)(d) of the EIRs, and the third question is, if that information does fall within the exception, whether in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

The information requested

20. Paull & Williamsons requested "the Agricultural Assessment on Individual Farm Units which is contained in part of the Stage 2 Assessment of the Report entitled 'Response to Messrs McIntosh Consultation'." This Report provides information on the processes involved and summarises the factors in assessment of the merits of options in respect of selection of the preferred line for the route.



21. “The Response to Messrs McIntosh Consultation” states:

“Agricultural

In consideration of the impacts of route options through the Goval area, the assessment found that there were no discernible differences between the routes in relation to impacts on land take.”

22. In reading the quoted passage it might be reasonable to expect that there exists a document which comprises “the assessment”. However, the Council explained that there is not such a document but rather, at best, a working file comprising three documents. The Council explained that at a meeting in respect of this Report (on 24 January 2005), involving Paull & Williamsons and the Council, mention was made of an agricultural assessment report, and that the Council believe that this was assumed by Paull & Williamsons to be a final written report prepared by the SAC for Jacobs Babbie.

23. In the summary of this Report there is also the passage:

“The agricultural assessment will include updating land use, severance and boundary impacts for individual farm units to take consideration of the developing proposals. Assessments of the impact on viability of individual farm units will also be undertaken. These assessments will be undertaken by SAC who will consult with each landowner affected.”

This passage points to a future agriculture assessment which will involve the SAC.

24. From the reading of the report, I would accept that Paull & Williamsons were justified in believing from the Consultation document that a report existed. The Council should have clarified at an early stage whether there existed a document which was the Agricultural Assessment requested by Paull & Williamsons. I would draw the attention of the Council to paragraph 27 of the Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Environmental Information (Scotland) Regulations 2004 (the Section 62 Code), which provides guidance on what a public authority should do if a request is unclear or ambiguous.



Application of regulation 10(4)(d) of EIRs

25. Neither party contended that the material withheld was not environmental information in sense of regulation 2(1)(a) of the EIRs. Having considered the material which has been withheld, I am satisfied that it comes within the definition of environmental information as defined by regulation 2(1). The implementation of the AWPR will change the state of the land and the withheld information is such that it would fall within the definition of written information on the state of the elements of the environment such as soil, land and landscape. I take the view that the three documents are environmental information as defined in regulation 2(1) of the EIRs and can be considered to be held by the Council, which it did not dispute.
26. Regulation 10(4)(d) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data. As noted above, in considering the application of this exception, regulation 10(2) states that Scottish public authorities shall interpret the exception in a restrictive way and apply a presumption in favour of disclosure.
27. The Aarhus Convention: An Implementation Guide provides an overview of the exception. It states at page 58:

“The Convention does not clearly define ‘materials in the course of completion’. However, the mere status of something as a draft does not automatically bring it within the exception.”
28. In considering this case, I have looked at the decision by the Information Commissioner which interprets the equivalent regulation 12(4)(d) of the Environmental Information Regulations 2004 – the decision in respect of Plymouth City Council [Case Ref: FER0069925 Date: 02/03/2006].
29. In respect of the safety audit in that case the Information Commissioner said in his statement of reasons:

“... each report constitutes a separate document which is distinct from others in the series. It follows that when the stage 2 safety audit report was produced in May 2004 it was a finished and completed document.”
30. In its submissions, the Council explained that its review notice had stated that “the material requested is currently in draft form” referred to the fact that the information was part of a working file which was used at design meetings, and there never was “a report”.



“In the course of completion”

31. The Aarhus Convention: An Implementation Guide provides an overview of the exception and, at page 59, states:

“[In the course of completion] suggests that the term refers to individual documents that are actively being worked on by the public authority. Once those documents are no longer in the “course of completion” they may be released, even if they are still unfinished and even if the decision to which they pertain has not yet been resolved.”

This guidance also suggests that to come within the exception the document should require to have more work done on it within some reasonable time-frame.

32. Taking account of the previous decisions and guidance available on this particular exception, I do not accept that the withheld material is material which is still in the course of completion. I have looked at the case of *Maile v Wigan Metropolitan Borough Council* [2001] Env L R 11, which interpreted the equivalent regulation (regulation 4(2)(d)) of the previous statutory provision: the Environmental Information Regulations 1992 (“the 1992 Regulations”). This case concerned a database which comprised raw data concerning potentially contaminated sites to which the authority refused access on the ground that it was incomplete, possibly containing inaccuracies. The court commented on the regulation:

“...it would be highly unsatisfactory to reveal material which had variously been described as inchoate, embryonic and hypothetical” [7] (per Eady J).

33. In the present application, each document is, as far as I can see, material which is complete: the documents withheld are not at a preparatory state, and any ‘incompleteness’ or inchoateness is due, as far as I can see, to their nature as working notes rather than as being in stages for publication. For example, there are not stages which the documents have to go through before being complete. That the document will inform a greater and currently incomplete document (the EIA) is not in dispute. As I understand it, whilst the documents are in use, they are not having more work done on them. They are, as the Council said, “working notes”.



“Unfinished document”

34. For the same reasons, I do not accept that the withheld material is material which falls within the definition of an unfinished document. The EIA clearly is an unfinished document, but the working notes are, as I see it, finished. I will consider each application on a case by case basis, and there may be grounds for stating that a working note is an unfinished document in the sense of regulation 10(4)(d) if it is being worked upon. However, I cannot see how these working notes could become “finished”.

“Incomplete Data”

35. I have also considered the contents of the documents and am of the opinion that they do not relate to incomplete data. There are no aspects of the data within the documents withheld that make the data there incomplete. The material in the withheld documents is, as far as I can assess, factual information. The material is not going to be transposed fully into the final EIA, but revised and incorporated into that final document.
36. In conclusion, I do not accept that the withheld documents fall within the exception contained in regulation 10(4)(d). They are, as the Council stated, working notes. The Council in its submissions stated that the EIA is a work in progress and publication of “information acquired specifically for the Environmental Impact Assessment would be detrimental”. Paull & Williamsons did not request access to the EIA.
37. In considering this application, I have take account of regulation 10(2) of the EIRs, which states that in the application of an exception, that exception should be interpreted restrictively with a presumption in favour of disclosure. As I have said in respect of other decisions, I shall look at each case on a case by case basis. I am not satisfied that the exception provided by regulation 10(4)(d) of the EIRs is engaged.

Public interest

38. Having decided that regulation 10(4)(d) of the EIRs does not apply to the material, I am not required to consider the public interest arguments in favour of release or withholding of the information.
39. However, I would make the following comments. The Council in its submissions stated that the EIA is a work in progress and publication of “information acquired specifically for the Environmental Impact Assessment “, and released prior to its publication “will hinder discussions and the process of design”. It was further explained that publication would prevent the lead consultant reviewing and amending information for the EIA in an unhindered way.



40. The Council explained that it was not in the public interest for it to provide to all the landowners, or interested persons, affected by the AWPR the working notes that related to the proposed changes. These notes would be revised and provided within a comprehensive proposal in the EIA and there were legal requirements in respect of this assessment. The Council expressed its concern that the many individuals involved in the AWPR would be unable to take notes, from which to work and make calculations, and which would be revised to form a final EIA, if there was the requirement to provide these notes.
41. Additionally, there would be the detrimental effect on the final report and the detrimental effect on the economic interests of those lying along the five possible routes. The Council also pointed to the intended public enquiry and stated that this was the proper method for such a matter to be dealt with is on and after publication of the final report.
42. Although I have sympathy with these arguments, I do not see how publication of these specific three documents would prevent further amendment to the final EIA. These notes are working notes – albeit complete – and any recipient of these notes should recognise them for what they are – working notes that will, amongst other information, inform a final document.
43. However, as stated above, given that I have held that the information does not fall within the exception contained in regulation 10(4)(d), I am not required to consider the merit or demerit of the public interest arguments advanced by the Council or Paull & Williamsons.

Decision

I find that Aberdeen City Council (the Council) did not comply with the Environmental Information (Scotland) Regulations 2004 (EIRs) in refusing to provide the information requested on behalf of Messrs McIntosh on the basis of the exception in regulation 10(4)(d) of the EIRs.

In withholding the documents, the Council failed to comply with regulation 5(1) of the EIRs.

I require the Council to supply Messrs McIntosh, through their solicitors, Paull & Williamsons, with a copy of the information contained in the three documents.

I require the Council to disclose this information to Messrs McIntosh within 45 days of receipt of this decision notice.



Appeal

Should either the Council or Messrs McIntosh wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
11 December 2006



APPENDIX

Relevant Statutory Provisions

Environmental Information (Scotland) Regulations 2004

2 Interpretation

- (1) "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;
 - (d) reports on the implementation of environmental legislation;
 - (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);



- (2) For the purpose of these Regulations, environmental information is held by a Scottish public authority if it is-
 - (b) held by another person on that authority's behalf, and ... it has not been supplied by a Minister of the Crown or department of the Government of the United Kingdom and held in confidence.

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.

- (4) A Scottish public authority may refuse to make environmental information available to the extent that
 - (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data

