

Decision Notice 031/2020

Draft Lease between Trustees of Crossgates Village Group and Fife Council

Applicant: The Applicant

Public authority: Fife Council

Case Ref: 201901659



Scottish Information
Commissioner

Summary

The Council was asked for the draft lease negotiated with Crossgates Village Group regarding the use of a public park by a community football club.

The Council withheld the information under regulation 10(5)(e) of the EIRs, explaining disclosure would hinder future negotiations.

During the investigation, the Council disclosed a small amount of information but the Commissioner decided the Council had breached regulation 5(1) of the EIRs by not disclosing it at the time of asking. He also decided that the Council wrongly applied regulation 10(5)(e) to the remainder of the draft lease.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of “environmental information”); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2) and (5)(e) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 7 May 2019, the Applicant made a request for information to Fife Council (the Council). The information requested was a draft lease, containing a plan of a public park, under negotiation with the Trustees of the Crossgates Village Group (CVG) for use by a local amateur football club.
2. The Council responded on 7 June 2019, withholding the draft lease under regulation 10(5)(e) of the EIRs. The Council commented that discussions relating to the lease were not complete and submitted that disclosure could hinder this process and impact on its ability to negotiate the best terms possible.
3. On 12 June 2019, the Applicant wrote to the Council, requesting a review of its decision on the basis that the information had not been properly withheld.
4. The Council notified the Applicant of the outcome of its review on 10 July 2019, upholding its response with further explanation, but also confirming that negotiations were on hold due to a consultation process and meetings. However, it provided some basic information on the proposed lease by way of advice and assistance.
5. On 3 September 2019, the Applicant wrote to the Commissioner’s office. The Applicant applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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 Council’s review, setting out why he believed disclosure was in the public interest.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 2 October 2019, the Council was notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer and the Council was asked to send the Commissioner the draft lease.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and to answer specific questions, including why it considered the test in regulation 10(5)(e) to be met in this case.
9. For clarity, the Commissioner notes there was a reference to a wholly unrelated party, typed in error on the draft lease's signature sheet and backing page. This information is not in scope as it does not pertain to CVG.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

11. The Council responded to the Applicant's request in terms of the EIRs, rather than FOISA, and the Applicant has not disputed this.
12. The Commissioner is satisfied that the information requested is environmental information as defined in regulation 2(1) of the EIRs. It relates to a substantial use of land at the centre of a small community and falls within paragraph (c) of the definition of environmental information, being information on measures and activities affecting or likely to affect the state of the elements of the environment referred to in paragraph (a).

Regulation 5(1) of the EIRs - Duty to make environmental information available

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 a 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 regulations 6 to 12 applies (regulation 5(2)(b)).
15. During this investigation (on 20 December 2019) the Council disclosed to the Applicant some information (a plan of the park, together with the opening paragraphs on the first page). These paragraphs confirmed the names of the two parties and their details.
16. The Commissioner concludes that the Council should have disclosed this information sooner, at the time of asking, and that it breached regulation 5(1) of the EIRs by not doing so.

Regulation 10(5)(e) of the EIRs

17. Under the EIRs, a Scottish public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply, subject to conditions which are considered below.
18. Regulation 10(5)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available where 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. The Council relied on this exception to withhold all unpublished information in the contract documentation.
19. A Scottish public authority applying an 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 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)).
20. *The Aarhus Convention: an Implementation Guide*¹, 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 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 considered further below.
21. 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 commercial or industrial in nature?
 - (iii) Does a legally binding duty of confidence exist in relation to the information? And, if so, does it protect a "legitimate economic interest"?
 - (iv) Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

Is the information publicly available?

22. The Commissioner asked the Council whether any of the withheld information was already in the public domain. The Council confirmed that the draft lease had been sent to the solicitors working on behalf of CVG but that none of the withheld information has been released to the public.
23. The Council's website states:

"Fife Council is gathering the public's view on proposals to lease Humbug / School View Park to a local Crossgates Community Group. Crossgates Village Parks community group have put forward a set of proposals based on them holding a long-term lease."

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

24. The Council also confirmed that a consultation process² was progressing, after which negotiations were expected to restart. The Council gave no indications of when this might be, although on its web pages it gives the consultation period as running from 23 May 2019 to 28 February 2020, with a report due on 31 March 2020. The Council submitted that no information on the proposed lease terms had been disclosed during the consultation.
25. The Commissioner cannot accept the Council's view that the withheld information is not publicly available. The draft in question is clearly a standard form of commercial lease, which must have been seen by a good many other potential tenants and their agents previously. It would be surprising if it were not very similar to a good many other standard forms of lease in use elsewhere. It can hardly be denied that the information has been made available widely, and there appears to be nothing in its character which is inherently "private".
26. To the extent that the draft lease has provisions which are specific to this particular transaction, these would appear to be the provisions identifying the parties, the subjects of lease, the duration of the lease and the rent. The Council has provided the Applicant with information on these matters, either in its review outcome or in the information disclosed during the investigation. There are a few marginal notes which must be specific to this draft, but these really add nothing of substance to what is in the body of the draft.
27. In the circumstances, the Commissioner is unable to accept that the withheld information is not publicly available.

Is the information commercial or industrial in nature?

28. The Council submitted that the information related to a commercial agreement in the process of being negotiated, which was paused but which could resume.
29. It noted that the provisions within the lease were all subject to negotiation. Disclosure would be detrimental to that process and would affect the commercial, positions of both parties.
30. The Commissioner accepts that the draft lease forms part of a negotiating process which could be considered commercial in nature, certainly from the point of view of the Council as landlord, in that the outcome of that process could affect who bears responsibility for financial obligations relating to the property. It is less clear whether it can be said to be commercial from the perspective of the tenant, which is a Scottish Charitable Industrial Organisation.

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

31. In its review outcome, the Council stated that an implied duty of confidence attached to commercial negotiations of this nature. The Commissioner acknowledges that this may be the case, but (given the nature of the withheld information, as considered above in the context of whether it was publicly available) he cannot accept that such a duty can reasonably be implied in relation to this particular information.
32. Given the absence of these basic elements, the Commissioner does not consider it necessary to determine whether disclosure would, or would be likely to, cause substantial harm to a legitimate economic interest, or whether the public interest in making the information available is outweighed by that in maintaining then exception in regulation 10(5)(e). He is not satisfied that the exception can be upheld in the circumstances and must require that the remaining withheld information be disclosed.

² <https://online.fifedirect.org.uk/consult/index.cfm?fuseaction=consult.display&objectid=E938AA19-DE1A-41F0-86C303E260AA7259>

Decision

The Commissioner finds that the Fife Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The information disclosed during this investigation (the plan, with details of the two parties) should have been disclosed at the time of asking: by not disclosing it at this point, the Commissioner finds that the Council breached regulation 5(1) of the EIRs.

The Commissioner also finds that the Council wrongly withheld the remaining information under regulation 10(5)(e) of the EIRs, and thereby also breached regulation 5(1).

The Commissioner therefore requires the Council to provide the Applicant with the information which was wrongly withheld, by **24 March 2020**.

Appeal

Should either the Applicant or the Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

7 February 2020

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

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(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.

...

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;

...

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