

Decision Notice

Decision 067/2017: Mr Paul Cargill and Perth and Kinross Council

Road Maintenance Partnership Investigation

Reference No: 201602046
Decision Date: 5 May 2017



Scottish Information
Commissioner

Summary

The Council was asked for information regarding an investigation into its Road Maintenance Partnership.

The Council disclosed some information and withheld the remainder under a number of exceptions in the EIRs. The Council disclosed a redacted version of one report during the investigation.

The Commissioner accepted that the Council did not hold some information specified in the request. She accepted that some information should be withheld, but found that other information was wrongly withheld and required its disclosure.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition (a), (b) and (c) of “environmental information”); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2), (4)(a) and (5)(b) (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.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. On 8 March 2016, Mr Cargill made a request for information to Perth and Kinross Council (the Council). He referred to a report entitled “Road Maintenance Partnership Investigation” which was presented to the Council’s Audit Committee in September 2015¹: a report from Audit Scotland relating to the Council’s Road Maintenance Partnership with Tayside Contracts². In the parts of his request which are the subject of this decision he asked for:
 1. The correspondence received by the Council in 2013/14 referred to in paragraph 1 [of the Audit Scotland report].
 3. The external consultant investigation of December 2014.
 4. The internal investigations of April and June 2015.
2. The Council responded on 6 April 2016. It withheld the requested information under the exception in regulation 10(5)(b) of the EIRs. The Council stated that the information related to a matter which was the subject of a potential claim, and might form part of legal proceedings in the future.

¹ <http://www.pkc.gov.uk/article/12163/Audit-Committee-16-September-2015>

² [http://www.pkc.gov.uk/media/33040/15-09-16-Item-4-ii-a-15-374-/pdf/15-09-16_-_Item_4\(ii\)\(a\)_\(15-374\)](http://www.pkc.gov.uk/media/33040/15-09-16-Item-4-ii-a-15-374-/pdf/15-09-16_-_Item_4(ii)(a)_(15-374))

3. On 26 April 2016, Mr Cargill emailed the Council requesting a review of its decision. He did not see any “real reason” to withhold the information, only the perceived danger of a potential claim and, on that basis, believed it was wrong to withhold the information.
4. The Council notified Mr Cargill of the outcome of its review on 19 May 2016. It upheld its initial response without modification, stating that the prospect of legal action was real and not “perceived”.
5. On 7 November 2016, Mr Cargill applied to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Mr Cargill considered that the requested information should be disclosed as it related to extremely serious allegations, which had been the subject of several internal investigations, a police investigation and an external audit report.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Cargill made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 6 December 2016, the Council was notified in writing that Mr Cargill had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr Cargill. The Council provided the information and the case was allocated to an investigating officer. The withheld information comprised a letter, an external investigation report, and an internal investigation report.
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 Mr Cargill’s application and answer specific questions. These questions focused on the searches which the Council had carried out to identify information covered by the request, and its reasons for withholding information under the exception in regulation 10(5)(b) of the EIRs.
9. The Council responded on 3 and 6 February 2017. It stated that the letter provided as part of the withheld information did not fall within scope of Mr Cargill’s request. In line with regulation 10(4)(a) of the EIRs, it stated that it did not hold any correspondence covered by part 1 of the request (i.e. correspondence referred to in paragraph 1 of the Audit Scotland report).
10. Enquiries were made to Audit Scotland on this point (discussed later in this decision).
11. The Audit Scotland report author indicated that the Council had prepared two internal investigation reports, not the single report which the Council had provided to the Commissioner. The Council was asked to search for the other internal investigation report, and provided it to the Commissioner. It confirmed that this report was withheld in its entirety under regulation 10(5)(b) of the EIRs.
12. On 10 April 2017, the Council disclosed a redacted version of the external investigation report to Mr Cargill. It withheld some information under regulation 10(5)(b) of the EIRs.

Commissioner's analysis and findings

13. 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 her by both Mr Cargill and the Council. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

14. 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) to (c) of the definition of "environmental information"). Mr Cargill's request was for information about the management of road maintenance contracts, which is covered by paragraph (c) in being information about measures (including administrative measures) and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b).
15. Mr Cargill has not disputed the Council's decision to handle the request under the EIRs and so the Commissioner will consider the information solely in terms of the EIRs in what follows.

Regulation 5(1) – information falling within scope of the request

16. 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. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold.
17. On receipt of a request for environmental information, the authority must establish 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 (see regulation 5(2)(b)).
18. The Council provided details of the searches it had conducted, and explained why it was satisfied that it did not hold any further information.
19. Having considered all the relevant submissions and the withheld information, the Commissioner is satisfied that, by the end of the investigation, the Council had identified the information falling within the scope of Mr Cargill's request:
- External investigation report – partially disclosed to Mr Cargill during the investigation;
 - First internal investigation report and appendix – withheld in its entirety; and
 - Second internal investigation report – withheld in its entirety.
20. The Commissioner finds that by failing to identify all relevant information (specifically, the second internal investigation report) when the Council responded to Mr Cargill's request and request for review, the Council failed to comply fully with regulation 5(1) of the EIRs.

Regulation 10(4)(a) of the EIRs- correspondence received by the Council in 2013/14

21. The Audit Scotland report to which Mr Cargill's request refers includes begins:

During 2013/14 Perth and Kinross Council received correspondence relating to a potential loss on the part of a contractor and included a contingent liability in its 2013/14 annual accounts. This correspondence related to the Roads Maintenance Partnership (RMP), which

is a partnering agreement between Perth & Kinross Council and Tayside Contracts for delivery of the Council's roads maintenance service, and implied improper practices and improper relationships by employees of both organisations.

Mr Cargill asked for the correspondence to which Audit Scotland had referred.

22. As noted above, the Council initially provided the Commissioner with a letter which it considered to be part of the withheld information in this case, but then changed its position and argued that the letter was not covered by the terms of Mr Cargill's request. After reviewing the letter, the Commissioner accepts that it does not fall within the scope of Mr Cargill's request, as it pre-dates the period 2013/14.
23. The Council stated that, in relation to part 1 of the request, it had changed its position and would now claim the exception in regulation 10(4)(a) of the EIRs (information not held).
24. The Council stated that it had searched its records and had not identified any correspondence falling within the time period specified within the Audit Scotland report. The Council commented that it could not explain why the Audit Scotland report had referred to correspondence when none was held.
25. The investigating officer contacted the report author at Audit Scotland to seek clarification about the reference to correspondence in paragraph 1 of their report. It transpired that Audit Scotland had not received any copies of correspondence from the Council: the reference to correspondence was based on a telephone call with a Council official about potential legal action.

The Commissioner's findings

26. The standard of proof to apply in determining whether a public authority holds the requested information (or whether it holds more information than has been made available) is the civil standard of the balance of probabilities. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the steps taken by the public authority to identify and locate the information in question. She will also consider, where appropriate, any other reason offered by the public authority to explain why it does not hold information. While it may be relevant as part of this exercise to explore expectations as to what information the authority should hold, ultimately the Commissioner's role is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).
27. The Commissioner has considered all the relevant submissions, including the explanations provided by the Council and Audit Scotland in relation to the correspondence referred to in the Audit Scotland report and in part 1 of Mr Cargill's request. On the basis of the explanations provided by the Council and Audit Scotland, and evidence from the searches carried out by the Council, she is satisfied that the Council does not hold any information covered by part 1 of Mr Cargill's request.
28. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs and can only be upheld if, in all the circumstances, the public interest in maintaining the exception outweighs the public interest in making the information available. The Commissioner is satisfied that the Council does not hold the information in question. Consequently, she does not consider there to be any conceivable public interest in requiring that the information be made available. The Commissioner therefore concludes that the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.

29. The Commissioner finds that the Council was incorrect to inform Mr Cargill that the correspondence he had requested was excepted from disclosure under regulation 10(5)(b) of the EIRs.

Regulation 10(5)(b) of the EIRs – investigation reports

30. Regulation 10(5)(b) of the EIRs 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 course of justice, the ability of an individual to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature. As with all of the exceptions in regulation 10, it is subject to the public interest test in regulation 10(1)(b) and, in line with regulation 10(1)(a), must be interpreted in a restrictive way, with a presumption in favour of disclosure.

The Council's submissions

31. To support its view that the exception in regulation 10(5)(b) was relevant (in relation to the ability of a person to receive a fair trial), the Council provided the Commissioner with a copy of a letter from solicitors acting on behalf a third party (the claimant) seeking compensation from the Council in relation to the matters considered in the withheld reports.
32. The Council stated that there is a five-year period from the discovery of the issue in which an action of this nature can be brought to court, and this time period had not passed, in relation to the claim for loss.
33. The Council submitted that disclosure of the reports would effectively put the information in the public domain. It submitted that the information in the reports is unknown to the claimant and, in view of the threatened legal action, the provision of any information about the matter that would assist the claimant would substantially prejudice the Council's position. The Council considered that court actions are, by nature, inherently unpredictable and confrontational. The scale of the loss identified by the claimant, plus the potential legal costs, would represent a significant amount to the Council.
34. The Council recognised that time had passed since the matter was first raised, but stated that, at the date of the request, only a few months had elapsed since the threat of legal action had been received. The Council had not received any correspondence to indicate that the claim had been abandoned.

Mr Cargill's submissions

35. Mr Cargill disagreed with the Council's statement that the information "relates to a matter which is currently the subject of a potential claim, and may form part of legal proceedings in the future". He did not consider that the Council had the right to withhold information simply because it anticipated a potential claim.
36. Mr Cargill submitted that the investigation into the Council's Road Maintenance Partnership should be published and publicly available because of the extremely serious nature of the allegations. These allegations instigated several internal investigations, including a police investigation and an external audit investigation. Mr Cargill considered that all of the internal investigations will have been carried out by the local authority's own internal auditors, meaning these were publicly funded investigations.

Commissioner's conclusions

37. The Council has provided evidence that a third party has raised a claim for compensation, and has given reasons why, if the withheld information is disclosed, it would substantially prejudice the course of justice and the Council's ability to receive a fair trial.
38. The Commissioner is satisfied that the Council has provided evidence that litigation on the matters covered by the withheld reports is a real possibility.
39. The Commissioner recognises that the course of justice requires that parties to litigation (including public authorities) are able to prepare fully for a case. The principle, derived from the adversarial nature of litigation, is that no party can recover material which another party has made in preparing its own case.
40. However, even when litigation is a real possibility, it is important to consider whether the test of substantial prejudice can be met, in relation to the withheld information. Information which is wholly factual in nature, for example, may well be capable of disclosure without causing substantial prejudice, even if in other circumstances it might be considered privileged. The Commissioner must be satisfied that disclosure would, or would be likely to, cause substantial prejudice to the course of justice before accepting that the information was correctly withheld under regulation 10(5)(b).
41. The Commissioner notes that the Council has disclosed some parts of the external investigation report which would not cause substantial prejudice (information disclosed during the Commissioner's investigation), and by doing so, has accepted that the disclosed information was wrongly withheld under regulation 10(5)(b) of the EIRs.
42. Having considered the withheld information in detail, the Commissioner is not satisfied that, in all instances, disclosure of the information withheld from Mr Cargill would, or would be likely to, prejudice substantially the course of justice or the ability of the Council to receive a fair trial. This applies to some information on pages one, four and five of the first internal investigation report. Additionally, some of the information contained within the second internal investigation report is factual information which, if disclosed, would not and would not be likely to put the Council at any disadvantage in future legal action (e.g. a summary of the actions and processes relating to the Roads Maintenance Partnership and other information which is already public knowledge). The Commissioner does not accept that the exception in regulation 10(5)(b) applies to such information.
43. As the Council wrongly withheld this information and did not make it available in response to Mr Cargill's request, the Commissioner finds that the Council failed to comply with regulation 5(1) of the EIRs.
44. The Commissioner accepts that disclosure of the remaining information withheld under regulation 10(5)(b) would, or would be likely to prejudice substantially the Council's ability to pursue or defend its position in any future court proceedings. She therefore accepts that the Council was entitled to withhold this information under regulation 10(5)(b). Being satisfied that the exception is engaged in relation to such information, the Commissioner must go on to consider the public interest.

Public interest test

45. Having found that the Council correctly applied the exception in regulation 10(5)(b) to this information, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs. This specifies that a 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 Council's submissions

46. The Council acknowledged that there is a presumption in favour of disclosing environmental information, and disclosure would satisfy the general right of access to information held by a public authority. Disclosure would also assist with the scrutiny of the Council's financial affairs and would add clarity to the handling of the original complaints.
47. Against this, the Council argued that information about investigations into the Council's Road Maintenance Framework is already in the public domain, and the disclosure of the additional information covered by Mr Cargill's request was unlikely to add significantly to this scrutiny.
48. The Council concluded that, during the five-year period in which a legal claim can be pursued, and while the threat of legal action remains, the public interest in maintaining the exception outweighs that in disclosing the information.

Mr Cargill's submissions

49. Mr Cargill argued that if there was "potential" for a claim within the withheld information, this increased the public interest in making the information publicly available. He argued that if the information shows there was evidence of wrongdoing, the complainers and the public have every right to see what the investigations uncovered and this information should be in the public domain.

The Commissioner's conclusions

50. The Commissioner agrees with Mr Cargill that, due to the serious nature of the allegations involving the Council's roads maintenance partnership, there is a strong public interest in disclosure of information which would inform the public about the nature of those allegations, the investigations that have been carried out, and what action is proposed or has been taken.
51. On the other hand, the Commissioner accepts that the Council has received a claim for compensation and that there is potential for this matter to be heard in court. She considers that there is a considerable public interest in ensuring that the Council can defend its position if court action proceeds. It is unquestionably in the public interest that an authority is not placed at a disadvantage in court proceedings by disclosure of the withheld information to which regulation 10(5)(b) has been found to apply.
52. On balance, having weighed up the arguments advanced by Mr Cargill and the Council, the Commissioner finds that, in all the circumstances of this case, the public interest in making the remaining withheld information available to Mr Cargill is outweighed by that in maintaining the exception in regulation 10(5)(b) of the EIRs.
53. The Commissioner finds that the public interest in transparency and accountability, in relation to the investigations into the road maintenance partnership, is outweighed by the public interest in ensuring that any future court action relating to the road maintenance contract is not prejudiced by disclosure of information which would show the Council's likely position in such legal proceedings. Therefore, although there are good reasons why disclosure of the information might be in the public interest, the Commissioner accepts that, on balance and

having considered the information in question, there is currently a greater public interest in the information being withheld.

54. The Commissioner therefore accepts that the Council was entitled to withhold some information under regulation 10(5)(b) of the EIRs.

Information to be disclosed

55. The Commissioner has concluded that some of the information withheld by the Council should be disclosed to Mr Cargill. To aid compliance with her decision, the Commissioner will provide the Council with marked up copies of the relevant documents.

Decision

The Commissioner finds that Perth and Kinross Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Cargill.

The Commissioner finds that the Council correctly withheld some information under regulation 10(5)(b) of the EIRs. However, the Council:

- (i) failed to comply with regulation 5(1) of the EIRs, in failing to identify information covered by Mr Cargill's request and failing to provide information which was not excepted from disclosure;
- (ii) failed to apply the exception in regulation 10(4)(a) of the EIRs to information which it did not hold;
- (iii) wrongly withheld some information under regulation 10(5)(b) of the EIRs.

The Commissioner requires the Council to disclose the information which was wrongly withheld, by **19 June 2017**.

Appeal

Should either Mr Cargill 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
Acting Scottish Information Commissioner

5 May 2017

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

-

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (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)-

...

(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.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that

- (a) it does not hold that information when an applicant's request is received;

...

- (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-

...

- (b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;

...

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