

Decision Notice



Decision 108/2008 Mr Simon Brogan and Highland & Islands Fire Board

Site Specific Fire/Incident Plan

Reference No: 200800448, 200800262

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Summary

Mr Brogan requested a copy of the Site Specific Fire/Incident Plan for the Shore Street, Kirkwall fuel depot from the Highland & Islands Fire Board (the Board). The Board initially withheld the whole document, but following a review supplied Mr Brogan with a redacted version of the Incident Plan (citing several exemptions under FOISA). Subsequently, Mr Brogan made another specific request for information that had been redacted from the Incident Plan. The Board withheld this information under the same exemptions. Mr Brogan remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which the Commissioner decided (and the Board accepted) that the information withheld from Mr Brogan was environmental information for the purposes of the EIRs, the Commissioner found that the Board had dealt with Mr Brogan's request for information in accordance with the EIRs. Given the risks inherent in release, he was satisfied that the Board had been justified in withholding the information under regulation 10(5)(a).

Relevant statutory provisions and other sources

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2 (Interpretation - definition of "environmental information"); 5(1) (Duty to make environmental information available on request); 10(1), (2) and (5)(a) (Exceptions from duty to make environmental information available).

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

Background

1. On 26 August 2007, Mr Brogan wrote to the Board requesting a copy of the operational response plan to tackle a major fuel fire at the Shore Street, Kirkwall fuel depot. **[request 1]**



2. The Board responded on 24 September 2007. The Board confirmed that it held a site specific fire/incident plan for the premises in question (the Incident Plan) but that it was exempt from release under sections 31(1) (National security and defence), 35(1)(a)(Law enforcement); 39(1) (Health, safety and the environment) of FOISA.
3. On 30 October 2007, Mr Brogan wrote to the Board requesting a review of its decision. In particular, Mr Brogan argued that considerable information about the hazards presented by the site in question was already in the public domain.
4. The Board notified Mr Brogan of the outcome of its review on 29 November 2007. The Board acknowledged that elements of the Incident Plan were already in the public domain (specifically the fuel tank situation, capacity and content) and agreed to supply Mr Brogan with a redacted copy of the document. However, the Board maintained its reliance on sections 31(1), 35(1)(a) and 39(1) of FOISA in withholding the remainder of the Incident Plan.
5. On 1 January 2008, Mr Brogan wrote again to the Board requesting more specific information relating to the capabilities of the fire service in respect of an incident at Shore Street, Kirkwall. **[request 2]**
6. The Board responded on 29 January 2008. The Board highlighted to Mr Brogan that the information he sought was part of that redacted from the Incident Plan supplied as a result of request 1. The Board therefore withheld the information sought by Mr Brogan on the basis that it was exempt under sections 31(1), 35(1)(a) and 39(1) of FOISA.
7. Mr Brogan requested a review of the Board's decision in respect of request 2 on 12 February 2008 and the Board replied on 5 March 2008, upholding its original decision.
8. On 13 February 2008 (in respect of request 1) and 20 March 2008 (in respect of request 2) Mr Brogan wrote to the Commissioner's Office, stating that he was dissatisfied with the outcome of the Board's reviews and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. In his letter of 20 March, he highlighted the research he had undertaken on incidents at fuel depots and the issues arising from them.
9. The applications were validated by establishing that Mr Brogan had made requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its responses to those requests.

Investigation

10. On 27 February 2008 (request 1) and 31 March 2008 (request 2), the Board was notified in writing that applications had been received from Mr Brogan and asked to provide the Commissioner's Office with any information withheld from the applicant. The Board responded by providing a full copy of the Incident Plan, which it considered to contain the information withheld with respect to both requests. The case was then allocated to an investigating officer.



11. Having examined the information which had been withheld from Mr Brogan, the Commissioner took the view that it should be regarded as environmental information and therefore was subject to the requirements of the EIRs. The request, and the information withheld in relation to that request, concern an incident plan containing measures designed to protect the environment in the surrounding area, but which are also likely to affect that environment should they require to be implemented. It is also designed to deal with factors, in particular fire and discharges, likely to affect that environment.
12. The Commissioner accepted that the information sought by Mr Brogan in request 2 was clearly information which had been redacted from the Incident Plan in response to request 1. The two applications received from Mr Brogan were therefore conjoined into a single investigation.
13. The investigating officer subsequently contacted the Board, providing it with an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. The investigating officer advised the Board that the information appeared to be environmental information, asking it to comment on this and provide submissions on whether it would consider the information to fall under any of the exceptions contained in the EIRs. By virtue of regulation 17 of the EIRs, the enforcement provisions in Part 4 of FOISA apply to the EIRs as they do to FOISA.
14. In response, the Board acknowledged that the information sought was environmental information and sought to rely on section 39(2) of FOISA and regulation 10(5)(a) of the EIRs to withhold the information sought by Mr Brogan. Its submissions on these matters will be considered more fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

15. In coming to a decision on this matter, the Commissioner has considered all of the information and the submissions that have been presented by both Mr Brogan and the Board and is satisfied that no matter of relevance has been overlooked.

Section 39(2) of FOISA – environmental information

16. In the Commissioner's *Decision 218/2007 Professor A D Hawkins and Transport Scotland*, he considered the relationship between FOISA and the EIRs at some length and set out his understanding of the situation. Broadly, the Commissioner's general position on the interaction between the two regimes is as follows:
 - The definition of what constitutes environmental information should not be viewed narrowly
 - There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs
 - Any request for environmental information therefore **must** be dealt with under the EIRs



- In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2)
 - If the authority does not choose to claim the section 39(2) exemption it must deal with the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these)
 - The Commissioner is entitled (and indeed obliged) where he considers a request for environmental information has not been dealt with under the EIRs to consider how it should have been dealt with under that regime.
17. The Board's decision to cite section 39(2) of FOISA means that it considers the withheld information to be environmental information as defined in regulation 2(1) of the EIRs. Given that the information relates to the matters described in paragraph 11 above, the Commissioner is satisfied that it all falls within the definition of environmental information set out in regulation 2(1). Therefore, he accepts that the withheld information is exempt under section 39(2) of FOISA.
18. The exemption in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner's view is that in this case, as there is a separate statutory right of access to environmental information available to the applicant, the public interest in maintaining this exemption and dealing with the requests in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA.

Regulation 10(5)(a) of the EIRS

19. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available. It should be noted that under regulation 10(2)(b), authorities are required to interpret the exceptions in a restrictive way and apply a presumption in favour of disclosure.
20. Regulation 10(5)(a) of the EIRs excepts information to the extent that its disclosure would, or would be likely to, prejudice substantially international relations, defence, national security or public safety.
21. The Board believed that if specific information relating to on-site capacity, fuel storage and fire fighting capability were to be released into the public domain, then those intent on wrongdoing could use it to decimate fuel storage arrangements throughout the UK. The Board argued that this would have a detrimental effect on the emergency services, and also on the armed forces who relied on fuel for their vehicles and equipment. The Board submits that national security could be placed in serious jeopardy as a result.



22. The Board also submitted that should this information be disclosed then, by virtue of it becoming available to those intent on wrongdoing, for example through terrorism, it would (or would be likely to) endanger the physical health or safety of the staff on site, members of the Fire and Rescue Service and any other emergency service attending the incident, along with that of the residents and people in close proximity.
23. The Board stated that a major factor behind its decision to withhold the information was that should it be in the public domain, it would be available to people, such as terrorists, who would then have vital technical knowledge of the Fire & Rescue Service's overall fire fighting capability, and more importantly, be able to plan to overcome it.
24. The Commissioner has considered the information withheld by the Board. The information redacted focuses on specific incident scenarios and emergency procedures to be followed in the event of an incident, highlighting areas of vulnerability, the materials required to tackle an incident and the source of such materials. While querying whether any impact of disclosure on national security would be sufficiently direct to engage the exception, the Commissioner accepts that the safety of the staff at the oil depot, the emergency services and local residents is paramount. He considers the redacted information to present those who are capable of and intent on wrongdoing (as described by the Board) with an opportunity to exploit any areas of vulnerability to their advantage, and to disrupt or obstruct fire fighting activity, to the substantial danger of the groups of persons described. He accepts that there is a quantifiable risk of such wrongdoing happening, which can be said to be of some significance and not unduly remote. In all the circumstances, the Commissioner is satisfied that making the information available would, or would be likely to, prejudice public safety substantially. As indicated above, however, this exception is subject to the public interest test.

The Public Interest

25. In his application to the Commissioner, Mr Brogan referred to the Buncefield Oil Storage Depot incident and the subsequent investigation instructed by the Health and Safety Commission (<http://www.buncefieldinvestigation.gov.uk/index.htm>). In December 2005, a number of explosions occurred at Buncefield Oil Storage Depot, Hemel Hempstead, Hertfordshire. At least one of the initial explosions was of massive proportions and there was a large fire, which engulfed a high proportion of the site. Over 40 people were injured; fortunately there were no fatalities. Significant damage occurred to both commercial and residential properties in the vicinity and a large area around the site was evacuated on emergency service advice. The fire burned for several days, destroying most of the site and emitting large clouds of black smoke into the atmosphere. Mr Brogan believed that what had happened at Buncefield provided grounds for questioning publicly the Fire & Rescue Service's preparedness for such an incident.



26. Mr Brogan also made reference to a petition he had submitted to the Scottish Parliament regarding the location of fuel depots within residential areas (<http://www.scottish.parliament.uk/business/petitions/docs/PE936.htm>). This has been the subject of some examination by the Public Petitions Committee, with further consideration held over until summer 2008 pending implementation of Health and Safety Executive (HSE) advice on development control around large scale petrol storage sites and further work by HSE and the Scottish Government on revising strategies and policies in the light of the Buncefield investigation.
27. In considering the public interest, the Board accepted that a member of the public who lived near a fuel depot situated in close proximity to a number of residential buildings would rightly be concerned about his or her safety and that of others. It was also accepted by the Board that the public would want to know that the fire fighting capability of both the oil company and the Fire & Rescue Service was robust enough to deal with any contingency in a safe and efficient manner.
28. However, the Board went on to argue that the information requested contained detailed information relation to the fuel depot and the fire prevention measures in place. Whilst acknowledging that disclosure would probably serve to reassure the public that fire safety measures were in place, the Board also emphasised that it place the information into the public domain and thus make it available to people such as terrorists, who would then have the vital technical knowledge of the overall fire fighting capability and, more importantly, how to overcome it.
29. The Board submitted that it had taken regard of public awareness, debate and accountability of a public body, all of which would favour the disclosure of the information requested. However, it considered the requirement to ensure the efficient and effective conduct of the Fire & Rescue Service in relation to the health and safety of its staff and other emergency services, the safety of members of the community, the need to consider ongoing public safety issues, as well as the need to consider the current terrorist threat assessment, clearly favoured the non-disclosure of the information.
30. The Commissioner accepts that there is a strong public interest, given the location of this particular depot and in light of the Buncefield incident, in local residents having full access to relevant information concerning the risks posed by an incident at the oil storage depot and to seek assurances that sufficient capacity is in place to deal with such an incident. However, the Commissioner is also in no doubt that the protection of the local residents, and the staff of both the depot and the Fire & Rescue Service, is the principal concern for the Board and that the release of any information which would undermine to a significant extent the safety measures which have been put in place to achieve this (and the wider safety of the depot itself) would not be in the public interest.



31. The Commissioner has also taken into consideration the petition submitted by Mr Brogan to the Scottish Parliament, which considers the wider issue of locating oil depots within residential areas, and which is clearly indicative of a strong public interest in this issue. However, having considered the redacted information, the Commissioner is not satisfied that public debate on this wider issue could be assisted substantially by making it available. A balance has to be struck between reassuring the public that adequate measures are in place to deal with potentially catastrophic adverse events, and ensuring that the tactical and detailed contingency plans contained within such measures are safeguarded against potential threats which could undermine or disrupt such plans. The Commissioner believes that an appropriate balance has been struck in this case.
32. Having considered the competing arguments on both sides of the public interest, the Commissioner has decided that in all the circumstances of this case, the public interest in making the withheld information available is outweighed by that in maintaining the exception in regulation 10(5)(e) of the EIRs.
33. In this instance, therefore, the Commissioner is satisfied that the Board was correct in its application of the exception contained within regulation 10(5)(a) of the EIRs to withhold the information sought by Mr Brogan.

DECISION

The Commissioner finds that the Highland and Islands Fire Board acted in accordance with the requirements of the Environmental Information (Scotland) Regulations 2004 in responding to the information requests made by Mr Brogan.

Appeal

Should either Mr Brogan or the Highland and Islands Fire Board 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 after the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
8 September 2008



Appendix

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.
- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - ...
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
 - (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.

...

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.

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-



(a) international relations, defence, national security or public safety;

...