

Decision Notice



Decision 094/2009 Mr Brian MacGregor and Highland Council

Business Plan for Highland Housing Fair (2009) Ltd

Reference No: 200801544

Decision Date: 4 August 2009

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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Summary

Mr Brian MacGregor (Mr MacGregor) requested from Highland Council (the Council) a copy of the Business Plan for Highland Housing Fair (2009) Ltd (HHF). The Council responded initially by refusing to disclose the information, arguing that it had been provided in confidence from HHF whose interests would be adversely affected by disclosure. Following a review, Mr MacGregor remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had failed to deal with Mr MacGregor's request for information in accordance with the Environmental Information (Scotland) Regulations 2004 (the EIRs) by incorrectly withholding the information at the time of the request and request for review. He did not require the Council to take any action because the information had been disclosed in full to Mr MacGregor during the investigation.

Relevant statutory provisions and other sources

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

The Environmental Information (Scotland) Regulations 2004 (EIRs) regulations 2(1) (Interpretation) (definition of environmental information); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (5)(f) (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 22 September 2008, Mr Brian MacGregor wrote to the Council requesting a copy of the revised Business Plan for HHF.
2. The Council responded on 26 September 2008. It stated that this information was not held by the Council in terms of FOISA, because the Council officer concerned had received it in a capacity as an advisor to the Board of Directors of HHF, rather than as an employee of the Council. The Council suggested that Mr MacGregor addressed his request to HHF's Company Secretary.



3. In a subsequent email dated 27 September 2009, Mr MacGregor expressed dissatisfaction with the Council's response.
4. The Council treated this email as a valid request for review in terms of section 20(1) of FOISA, and responded by issuing a notice advising Mr MacGregor on the outcome of its review on 23 October 2009. This informed Mr MacGregor that the Council now considered that it did hold the information in its own right. This was because, following discussion with senior Council officials, it had recognised that the Council official who was involved in the matter also held a role as the Council's technical adviser to HHF.
5. However, the Council went on to advise Mr MacGregor that (having consulted with HHF), it had concluded that the information was exempt from disclosure in terms of sections 33(1)(b) and 36(2) of FOISA (which apply where disclosure would or would be likely to prejudice substantially the commercial interests of any person, or where disclosure would entail an actionable breach of confidence, respectively).
6. On 27 October, Mr MacGregor wrote to the Commissioner, seeking his intervention in this case.
7. Mr MacGregor sent a further email to the Council on 28 October 2008. In his email, Mr MacGregor indicated that was willing to receive the document with the names of potential sponsors redacted, but that he believed the remaining information should be disclosed because it was being used to influence the spending of public funds.
8. Having reviewed the correspondence between Mr MacGregor and the Council up to this point, the Commissioner was unable to accept that Mr MacGregor's email of 27 September was a valid request for review in terms of FOISA, because it did not fulfil the requirements of section 20(1)(c) of FOISA (which states that a requirement for review should specify the information request to which the review relates, and the matter which gives rise to the applicant's dissatisfaction). The Commissioner was therefore unable to validate an application from Mr MacGregor at that stage. However, the Commissioner was satisfied that Mr MacGregor's email of 28 February 2009 did fulfil the requirements of section 20(1)(c). Following discussion, the Council agreed to take forward a further review in response to this email.
9. Highland Council notified Mr MacGregor of the outcome of this review on 25 November 2008. This maintained the decision as set out in its first review response of 23 October 2009, described above.
10. On 27 November 2008, Mr MacGregor wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to certain specified modifications.
11. The application was validated by establishing that Mr MacGregor had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the public authority to review its response to that request.



Investigation

12. On 28 November 2008, the Council was notified in writing that an application had been received from Mr MacGregor and was asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.
13. The investigating officer subsequently contacted the Council, giving it 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. In particular, Highland Council was advised that the Commissioner had expressed a preliminary view that the information under consideration was environmental information as defined in regulation 2(1) of the EIRs. The Council was asked whether it considered the information to be environmental information and, if so, whether it wished to apply the exemption in section 39(2) of FOISA to the information. The Council was also asked to justify its reliance on any other provisions of FOISA (if the Council did not consider section 39(2) to apply) and the EIRs it considered applicable to the information requested.
14. Highland Council responded with detailed submissions on 6 February 2009, including background on the origin and structure of HHF, and the genesis of its Business Plan. The Council's view at this stage was that the information was not environmental, and so it did not wish to apply the exemption in section 39(2) of FOISA. However, it indicated that if the Commissioner decided that the information was environmental information, then it would cite the exception in regulation 10(4)(d), which applies to material in the course of completion, or incomplete documents or incomplete data. It noted that the withheld information was a draft proposal which had been passed to the officer concerned to review and amend.
15. In explaining its application of exemptions within FOISA, the Council said that it had been provided with a copy of the requested document in its role as an adviser to the Board of HHF, and that the board refused permission to disclose this on the basis that it was only a draft, and it had been provided in confidence. It provided further background information in support of its decision to withhold the information.
16. In further correspondence, the investigating officer sought clarification on the Council's position both in relation to FOISA and the EIRs. He also asked the Council to consider whether it would be willing to disclose the withheld information subject to redaction in line with Mr MacGregor's offer, i.e. with the names of potential sponsors removed.
17. The Council then consulted further with HHF, and as a result reconsidered its position and decided to disclose the withheld information in full. The Council wrote to Mr MacGregor on 23 March 2009 enclosing a full copy of the document.
18. After receiving this information, Mr MacGregor still wanted the Commissioner to issue a decision as to whether the Council was entitled to withhold the information when first responding to his request and request for review.



19. In further correspondence between the Council and the investigating officer, the Council confirmed that, having reconsidered its position, it accepted that the information that had been withheld was environmental information, and that it would apply the exemption in section 39(2) of FOISA. It withdrew its previous reliance upon the exception in regulation 10(4)(d) and instead maintained that it had been entitled to withhold the information on the basis that the exception in regulation 10(5)(f) of the EIRs applied. This exception applies where disclosure would, or would have been likely to, prejudice substantially the interests of the person who provided the information (i.e. HHF), where that person was not under any legal obligation to supply the information, and did not supply it in circumstances such that the information could, apart from under the EIRs, be made available, and where the third party has not consented to the disclosure.

Commissioner's analysis and findings

20. In coming to a decision on this matter, the Commissioner has considered all the withheld information and the submissions made to him by both Mr MacGregor and the Council and is satisfied that no matter of relevance has been overlooked.
21. This case is somewhat unusual, in that the information under consideration in what follows had been disclosed to Mr MacGregor by the time of writing this decision. Following this disclosure, Mr MacGregor confirmed that he remained dissatisfied with the way in which the Council handled his request, and the length of time it had taken for him to obtain the information which, in his view, should have been provided earlier (when he requested it). Mr MacGregor wanted this decision to consider whether the Council was entitled to withhold the information he had requested at the time when it responded to his request and conducted the review.
22. Before continuing, the Commissioner would note that he has considered (as he is required to do) the application of exemptions and exceptions to the information under consideration and (where this test is relevant) the balance of public interest in the circumstances that existed at the time when the Council notified Mr MacGregor of the outcome of its review, and disregarding any developments since that time, including the disclosure of the information to Mr MacGregor.

Environmental information

23. The Council initially took the view that the information requested by Mr MacGregor was not environmental and as a result should be dealt with entirely under FOISA. However, during the investigation, it accepted the preliminary view expressed by the Commissioner that the withheld information was environmental information.
24. Environmental information is defined in regulation 2(1) of the EIRs, and this definition is reproduced in full in the appendix to this decision. Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to the exceptions contained within regulations 10 and 11, and certain other restrictions set out in the EIRs.



25. The Commissioner understands that the proposed HHF event is intended to showcase environmentally-friendly housing design and use, by designing, constructing and exhibiting a significant number of houses designed with these objectives in mind, and built on a particular site. Low energy use and sustainability are amongst the design targets.
26. In addition, the Commissioner considers that any construction project such as this, irrespective of whether its content is (as in this case) environmentally-focussed, will inevitably also have a significant intrinsic environmental impact because of its construction and use.
27. Such environmental impacts will extend to a wide range of matters such as the sourcing and use of raw materials and energy; construction operations and techniques; transportation of materials, equipment and workmen to and from the site (plus related emissions and noise); the wider impact on local and national amenity, and other environmental matters, quite apart from the environmental focus central to the event proposal.
28. Having reviewed the information under consideration and the definition of environmental information set out in the EIRs, the Commissioner has concluded that it is entirely information on measures (including programmes, plans and activities) that are likely to effect the elements and factors referred to in parts (a) and (b) of the definition. As such, the withheld information entirely falls within the scope of part (c) of the definition of environmental information. He notes that the report also contains some information costs, benefits and other economic assumptions used within the framework of the measures relevant for part (c). This information would fall within part (d) of the definition of environmental information.
29. Although the information requested in this case is a business plan - and for the reasons stated above the Council initially took the view that as such it was not environmental information - the Commissioner's view is that the information in question is so closely related to the primary (environmentally-related) purpose of the proposed event, and also the company created to implement it, that it clearly constitutes environmental information. The Commissioner is satisfied that such a plan need not relate narrowly to proposed or future site use to qualify as environmental information.

Section 39(2) FOISA – exemption for environmental information

30. As noted above, the Council accepted during the investigation that the information withheld was environmental information, and so indicated that it wished to apply the exemption in section 39(2) of FOISA to this information. The exemption in section 39(2) of FOISA provides that environmental information as defined by regulation 2(1) of the EIRs is exempt from disclosure under FOISA (thereby allowing any such information to be considered solely in terms of the EIRs).
31. Given the Commissioner's conclusion that the information is indeed environmental information, he accepts that the exemption in section 39(2) applies to it.



32. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. Since there is a separate legislative right to environmental information available to Mr MacGregor (via the EIRs), the Commissioner also accepts that the public interest in maintaining the exemption under section 39(2) of FOISA and dealing with the information requested under the EIRs outweighs any public interest there may be in considering the disclosure of the information under FOISA. In what follows, the Commissioner has therefore made his decision solely in terms of the EIRs. .

Regulation 10(5)(f)

33. In terms of regulation 10(5)(f) of the EIRs, 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 interests of the person who provided the information where that person (i) was not under, and could not have been under, any legal obligation to supply the information; (ii) did not supply it in circumstances such that it could, apart from under these Regulations, be made available; and (iii) has not consented to its disclosure.
34. Regulation 10(2) of the EIRs provides that this exception must be interpreted in a restrictive way (regulation 10(2)(a)) and the public authority shall apply a presumption in favour of disclosure (regulation 10(2)(b)). It is also subject to the public interest test in regulation 10(1)(b).
35. The Commissioner's briefing on regulation 10(5)(f)¹ states that certain points should be addressed in considering whether this exemption applies. These are:
- Was the information provided by a third party?
 - Was the third party under a legal obligation to provide the information?
 - Could the provider be required by law to provide it?
 - Would release of the information cause substantial harm to the interests of the information provider?
 - Is the information otherwise publicly available?
 - Has the information provider consented to disclosure?
36. The Commissioner accepts that the information under consideration was provided to the Council by a third party, in circumstances where the third party was not under an obligation to supply it. He also notes that, at the point where the Council considered Mr MacGregor's request for review, the third party had not given its consent to disclosure.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section33/Section33.asp>



37. However, on the basis of the Council's comments on this case, the Commissioner has been unable to accept that disclosure at the time of the Council's response to Mr MacGregor's request for review would have, or would have been likely to prejudice substantially the interests of HHF.
38. The Council indicated that HHF had stated the document contained details of potential sponsors which had not been contacted, and which might never be contacted. HHF had expressed concern that disclosure would sour relationships with these potential sponsors and put the event in jeopardy.
39. While the Commissioner recognises this risk, he notes that the content of the report now disclosed does not differ significantly from other information about the project which was in the public domain by the time of Mr MacGregor's request for review. Where third parties are mentioned within the document as possible partners or sources of funding, these are passing references, clearly expressing only possibilities. The Commissioner can see no content within the document, disclosure of which would or would have been likely (at the relevant time for this decision) to substantially prejudice HHF's interests by harming its relationships with such third parties, and he has been provided with no supporting evidence to support the claim that such harm would be likely to arise.
40. In the absence of further arguments as to why disclosure would have been likely to substantially prejudice HHF's interests, the Commissioner has concluded that no such case can be made.
41. The Commissioner is therefore satisfied that the Council cannot justify its reliance upon the exception in regulation 10(5)(f) of the EIRs, and the Council was accordingly wrong to have withheld the information requested by Mr MacGregor.
42. Having found that the exception was incorrectly applied, the Commissioner has not gone on to consider the public interest test required by regulation 10(1) of the EIRs.

DECISION

The Commissioner finds that Highland Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Brian MacGregor (Mr MacGregor). Having concluded that the information under consideration in this case was environmental information, and that it was not excepted from disclosure under regulation 10(5)(f), the Commissioner found that the Council breached regulation 5(1) of the EIRs by failing to supply the information requested by Mr MacGregor.

However, given that the Council disclosed the requested information in full during the investigation, the Commissioner does not require the Council to take any action in response to this failure.

Decision 094/2009
Mr Brian MacGregor
and Highland Council



Appeal

Should either Mr MacGregor or Highland Council 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.

Margaret Keyse
Head of Enforcement
4 August 2009



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 –

- (a) the provision does not confer absolute exemption; and
- (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;
- (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);

...

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-

...

 - (f) the interests of the person who provided the information where that person-
 - (i) was not under, and could not have been put under, any legal obligation to supply the information;
 - (ii) did not supply it in circumstances such that it could, apart from these Regulations, be made available; and
 - (iii) has not consented to its disclosure; or