

Decision Notice



Decision 003/2013 Mr Paul Bova and Highland Council

Development Plan information

Reference No: 201201731

Decision Date: 16 January 2013

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Rosemary Agnew

Scottish Information Commissioner

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Summary

Mr Bova requested from Highland Council (the Council) information relating to the Highland-wide Local Development Plan (HWLDP), in respect of a specific site. The Commissioner carried out an investigation and accepted that the Council did not hold the information requested by Mr Bova.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(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(1) (definitions (a) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (4)(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 3 July 2012, Mr Bova wrote to the Council and requested the following information, relating to the Council's decision to promote the Barratt site at Resaurie (reference H58) in the HWLDP:
 - a) all communication, written and oral, including discussions at meetings, and with external parties, leading to the decision to promote the site in the HWLDP. In this connection, he referred to communications prior to, during the processing of and after the approval of a specific application for planning permission.
 - b) all information as to the feasibility of promoting the site in the HWLDP across the above timeline.



2. The Council responded on 26 July 2012. It informed Mr Bova that the land in question had been allocated in principle for housing development for at least twenty years. The Council provided some information as to the process which had been followed in respect of successive development plans and provided web links to where relevant information was publicly available. However, it could find no recorded information falling within the scope of Mr Bova's requests.
3. On 10 August 2012, Mr Bova wrote to the Council requesting a review of its decision. He stated that certain general policies had not been provided and asked whether there were any communications in existence discussing the inclusion, or feasibility of including, this site within the development plan(s) since 1994.
4. The Council notified Mr Bova of the outcome of its review on 6 September 2012. It provided Mr Bova with the general policies, explaining that it had not previously considered these relevant to his requests. While providing further explanation, it confirmed that it did not hold a record of any discussion or feasibility assessment for the site in question (and therefore did not hold the information Mr Bova had requested).
5. On 13 September 2012, Mr Bova wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying 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 certain specified modifications.
6. The application was validated by establishing that Mr Bova 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 response to those requests. The case was then allocated to an investigating officer.

Investigation

7. 19 September 2012, the investigating officer notified the Council in writing that an application had been received from Mr Bova, 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, the Council was asked to justify its reliance on any provisions of FOISA and the EIRs it considered applicable to the information requested and to explain the steps it had taken to identify and locate the information Mr Bova had requested.
8. The Council responded on 18 October 2012 providing submissions to the effect that the requests fell to be dealt with in terms of the EIRs, and in support of its position that the requested information was not held.



9. While Mr Bova's application to the Commissioner included comments regarding the planning processes followed in relation to the site, and the Council's explanations in relation to these, the Commissioner cannot comment on the content of these explanations or the interpretations placed on these or the processes in question by either Mr Bova or the Council. The Commissioner can only consider whether or not the Council held any information falling within the scope of Mr Bova's request.
10. The relevant submissions received from both the Council and Mr Bova will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to her by both Mr Bova and the Council and is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

12. It is clear from the Council's correspondence with both Mr Bova and the Commissioner that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns the allocation of land for development in the HWLDP and the Commissioner is satisfied that it would fall within either paragraph (a) of the definition of environmental information contained in regulation 2(1) of the EIRs (as information on the state of the elements of the environment, including land and landscape) or paragraph (c) of that definition (as information on measures – including plans – affecting or likely to affect those elements).

Section 39(2) of FOISA – environmental information

13. The exemption in section 39(2) of FOISA provides, in effect, 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. In this case, the Commissioner accepts that the Council was entitled to apply the exemption to the withheld information, given her conclusion that it is properly classified as environmental information.
14. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exemption and in dealing with the request in line with the requirements of the EIRs outweighs any public interest in dealing with the request under FOISA.



Regulation 5(1) of the EIRs

15. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) 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, but which is not in fact held.
16. 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 (see regulation 10(1) and (2), as set out in the Appendix below).

Regulation 10(4)(a) of the EIRs

17. Regulation 10(4)(a) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received. As indicated above, the exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs.
18. During the investigation, the Council provided submissions in response to the questions put by the investigating officer on this matter. It explained that any historical information relative to the Inverness, Culloden and Ardersier Local Plan (adopted in April 1994) and before was paper based and that only the principal documents had been retained. For more recent development plans, the Council explained that it held a mixture of electronic and paper based files.
19. The Council believed it had carried out adequate searches. It described the searches carried out to establish what relevant information it held, including the sets of records searched. These had covered both electronic and manual searches of the relevant hard copy and electronic filing systems, including the relevant archived records, which did not reveal any information falling within the scope of the request.
20. Having considered the Council's submissions, the Commissioner is satisfied that it carried out adequate searches, with a view to identifying and locating the information requested by Mr Bova. In view of the explanations provided, she would not expect any relevant information to be held.
21. In this case, the Commissioner is satisfied that the Council did not, at the time it received Mr Bova's request, hold the information he requested, which is specific to the promotion of the site in question for development. Consequently, she does not consider there to be any conceivable public interest in requiring that any information be made available. The Commissioner therefore concludes that, in all the circumstances of this case, 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.



22. The Commissioner is satisfied, therefore, that the Council was entitled to refuse Mr Bova's request under regulation 10(4)(a) of the EIRs. Consequently, the Commissioner is satisfied that in this regard the Council complied with regulation 5(1) of the EIRs.

DECISION

The Commissioner finds that, in respect of the matters raised in Mr Bova's application, Highland Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002, and with the Environmental Information (Scotland) Regulations 2004, in responding to the information request made by Mr Bova.

Appeal

Should either Mr Bova 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
16 January 2013



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.

...



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;

...

(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;

...