

Decision Notice



Decision 113/2013 Pitlochry and Moulin Community Council and Historic Scotland

Development Viability Statement

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Summary

On 13 December 2012, Pitlochry and Moulin Community Council (PMCC) asked Historic Scotland for the Development Viability Statement relating to the demolition of Bank House, Pitlochry. The information was withheld by Historic Scotland on the basis that regulations 10(5)(e) and (f) applied.

Following an investigation, the Commissioner agreed with Historic Scotland that the Development Viability Statement was excepted from disclosure under regulation 10(5)(e) (which relates to commercial confidentiality).

Relevant statutory provisions

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(1) (Interpretation) (paragraphs (a), (c) and (e) 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 the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 13 December 2012, PMCC wrote to Historic Scotland requesting a copy of the Development Viability statement submitted in relation to the demolition of Bank House, Pitlochry.
2. Historic Scotland responded on 15 January 2013, informing PMCC that it was processing its request under the terms of the EIRs. It refused to provide the information, on the basis that regulations 10(5)(e) and (f) of the EIRs applied. Historic Scotland explained why it considered the exceptions to apply and why it believed the public interest test favoured withholding the information.



3. On 1 February 2013, PMCC wrote to Historic Scotland requesting a review of its decision. PMCC did not accept that the exceptions applied, submitting that disclosure was in the public interest given the weight that appeared to have been given to the Development Viability Statement in the decision-making process.
4. Historic Scotland notified PMCC of the outcome of its review on 4 March 2013. Historic Scotland maintained its reliance on regulations 10(5)(e) and (f) to withhold the information, but provided PMCC with further explanation of why it considered the exceptions to apply.
5. On 6 March 2013, PMCC wrote to the Commissioner, stating that it was dissatisfied with the outcome of Historic Scotland'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 PMCC made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. Historic Scotland is an Executive Agency of the Scottish Ministers (the Ministers). In line with agreed arrangements, subsequent references to submissions received from Historic Scotland are references to submissions made by the Ministers' Freedom of Information Unit on behalf of Historic Scotland.
8. On 19 March 2013, Historic Scotland was notified in writing that an application had been received from PMCC and was asked to provide the Commissioner with any information withheld from it. Historic Scotland responded with the information requested and the case was then allocated to an investigating officer.
9. The investigating officer subsequently contacted Historic Scotland, 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, Historic Scotland was asked to justify its reliance on any provisions of the EIRs it considered applicable to the information requested (with particular reference to those relied upon in its responses to PMCC).
10. The submissions received from Historic Scotland and PMCC, insofar as relevant, are 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 withheld information and the submissions made to her by both PMCC and Historic Scotland. She is satisfied that no matter of relevance has been overlooked.

Environmental information

12. PMCC has not challenged Historic Scotland's decision that the information it requested was environmental. Given that the information withheld relates to a significant redevelopment in the centre of Pitlochry, the Commissioner is satisfied that it can be properly regarded as environmental information as defined by paragraphs (a), (c) and (e) of the definition in regulation 2(1). Consequently, the Commissioner accepts that Historic Scotland was correct in dealing with this case under the EIRs.

Background

13. In October 2012, Perth and Kinross Council (the Council) notified Historic Scotland of its intention to grant consent for a development which involved the demolition of Bank House in Pitlochry. Historic Scotland was involved as this concerned a demolition within a conservation area. Where a planning authority (in this case, the Council) is minded to approve such a development, it must notify Historic Scotland for determination of whether they raise issues of national significance such that the Ministers should intervene before they can issue a decision. As part of this process, the Council provided Historic Scotland with the Developer's Development Viability Statement.
14. Historic Scotland submitted that the Statement requested formed a key part of the Council's decision to approve the application. Scottish Ministers concluded that, while the application did not fully meet the national policy requirements for demolition as set out in Scottish Historic Environment Policy, public benefits would accrue from the regeneration of the wider site and the replacement buildings would preserve the character of the conservation area. Historic Scotland therefore cleared the case back to the Council to determine.

Regulation 10(5)(e)

15. Regulation 10(5)(e) 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 confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
16. As with all of the exceptions under regulation 10, a Scottish public authority applying this 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 released 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)).



17. The Aarhus Convention: an Implementation Guide¹, which offers guidance on the interpretation of the convention from which the EIRs are derived, notes (at page 60) that the first test for considering this exception is whether national law expressly protects the confidentiality of the withheld information: it 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.
18. 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:
 - Is the information commercial or industrial in nature?
 - Does a legally binding duty of confidence exist in relation to the information?
 - Is the information publicly available?
 - Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

Is the information commercial or industrial in nature?

19. Historic Scotland explained that the Statement related to the developer's business methodology in terms of approach and assessment of costs associated with each of the development proposals, together with expected profit levels. It highlighted that the developer was only now in a position to bargain with possible alternative partners to agree business deals for proceeding with the development.
20. PMCC did not accept that there was a competitive environment in this case, as the developer in question had bought the land some time ago and the matter was now at the decision stage.
21. Having considered the withheld information, the Commissioner accepts that it relates to the developer's business methodology and contains details of the margins expected by the developer. Consequently, she accepts that it is commercial in nature.

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

22. The Commissioner considers that "provided by law" in terms of regulation 10(5)(e) will include confidentiality imposed on any person under the common law duty of confidence, under a contractual obligation or by statute.
23. At the point at which the Viability Statement was provided to Historic Scotland, it was emphasised that its contents were to be considered confidential. The Statement itself is marked confidential. The Commissioner is satisfied that the information under consideration has been received by Historic Scotland under an express obligation to maintain confidentiality.

¹ <http://www.unece.org/fileadmin/DAM/env/pp/acig.pdf> (the version in force at the time the authority dealt with the request)



Is the information publicly available?

24. Historic Scotland confirmed that the content of this Statement is not in the public domain. It stated that the document was only made available to itself and the Council. Within the Council, the document was assessed only by relevant officials and the Convenor of the Development Management Committee, the object being to minimise risk of breach of confidentiality.
25. The Commissioner accepts that, at the time Historic Scotland dealt with PMCC's request and request for review, the withheld information was confidential in nature and was being treated confidentially, and that no part of this information was in the public domain.

Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

26. As noted above, the term "legitimate economic interest" is not defined in the EIRs. In the Commissioner's view, the interests in question will, however, be financial, commercial or otherwise "economic" in nature, and the prejudice to that interest must be substantial. In order to apply this exception, an authority must, in the Commissioner's view, be able to demonstrate that the harm to the economic interest in question would be real, actual and of significant substance.
27. To support its submissions to the Commissioner, Historic Scotland supplied a copy of a letter it had received from the document's owner (the developer), after consulting with them about release of the information as a result of this request.
28. This letter highlighted the developer's view that their commercial interest would be substantially prejudiced, as the document related to their business methodology in terms of approach and assessment of the costs involved with each development proposal, together with expected profit levels. They believed disclosure of these particulars would enable contractors to ascertain the levels of margin and costs associated with different types of development proposals, which would be substantially prejudicial to their business. As only eight months had passed since the Statement was provided to Historic Scotland, they considered the information to remain current.
29. While the developer's views can never be the sole consideration in a situation such as this, they are clearly relevant. The Commissioner is satisfied that if this information had been disclosed in response to PMCC's request for review, it would have been likely to undermine the developer's ability to negotiate successfully with third parties. In reaching this conclusion, she takes into account that the document represents an expression of the developer's suggested business models, which are only now, on the granting of planning permission, being put into action. Accordingly, the Commissioner accepts that disclosure would have been likely to cause substantial prejudice to the developer's legitimate economic interests.
30. The Commissioner is satisfied, therefore, that Historic Scotland was entitled to apply the exception in regulation 10(5)(e) to the information falling within the scope of PMCC's request.



Consideration of the public interest test

31. Having accepted that the exception in regulation 10(5)(e) applies to the information withheld from PMCC, the Commissioner is required to consider the public interest in regulation 10(1)(b) of the EIRs. This specifies that a Scottish 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.
32. PMCC submitted that they considered it in the public interest that the document be disclosed as the proposed development was critical to the Pitlochry Town Centre. PMCC highlighted that there was much emphasis put on the content of this document at the Council's Development Management Committee meeting, even though it had not been disclosed to Councillors on the Committee. PMCC considered disclosure to be in the public interest, in adding transparency to the decision-making process.

Public interest arguments from Historic Scotland

33. Historic Scotland recognised the public interest in disclosure of the information. It states that this document was produced for the purposes of (i) justifying a planning application to the Council which included demolitions within a conservation area and (ii) calculating and specifying what would be profitable business agreements should the application be successful.
34. In terms of its first purpose, Historic Scotland recognised the public interest in having an open and transparent planning process, to allow the public to understand why relevant authorities reach their decisions. Secondly, they recognised that the actions of decision-takers should be open to public scrutiny. Generally, Historic Scotland acknowledged that the public interest would be served by knowing more clearly the basis upon which decisions affecting the public are made and why they are made.
35. Although Historic Scotland recognised that disclosing the document could be considered an important part of a fair and transparent planning process, especially now the application process had been concluded, it stated there were some instances where sensitive commercial information should remain confidential for a period of time, to allow for realities of commercial development to be undertaken.
36. On balance, Historic Scotland considered there was a greater public interest in withholding than disclosing the document for two reasons. Firstly, its release could contribute to difficulties in similar planning cases (for example, where crucial, commercially sensitive information concerning the viability of development projects was not provided for assessment by and justification to regulatory authorities, which could impact on them adequately discharging their functions).
37. Secondly, in this particular instance, Historic Scotland identified the likelihood of definite adverse business/commercial harm, likely to affect both the developer's legitimate economic interest and the satisfactory completion of the development and regeneration scheme now approved.



38. On balance, Historic Scotland concluded that the public interest in maintaining the exception and withholding the information outweighed that in its release in this case.

Conclusions on the public interest

39. The Commissioner has carefully considered all the public interest arguments put forward by both PMCC and Historic Scotland.
40. The Commissioner recognises the clear and strong public interest in having an open and transparent planning process, and in this regard she sympathises with PMCC (as, she notes, does Historic Scotland). On the other hand, the Commissioner notes that the information withheld in this case is commercial in nature (still current at the time of this request) and accepts that its disclosure is likely to put the developer in an unfavourable position (to the extent of substantial prejudice) when negotiating with external parties now that the development has been approved.
41. The Commissioner also notes that the information appears to have been provided to Historic Scotland on a voluntary basis (there being no legal basis for securing its provision otherwise). She also notes that figures presented in previous versions of this Viability Statement have been robustly challenged and questioned by Historic Scotland.
42. In all the circumstances of this case, the Commissioner is satisfied that the public interest in maintaining the exception, specifically in preserving Historic Scotland's ability to obtain and analyse such sensitive commercial information during the notification process and in protecting the competitive advantages conferred by the withheld information, outweighed that in disclosure at the time Historic Scotland dealt with PMCC's request and requirement for review.
43. The Commissioner notes that this information is commercial in nature and acknowledges, in line with other decisions considering commercial information, that its currency (and therefore its sensitivity) may reduce with time.
44. In conclusion, the Commissioner is satisfied that Historic Scotland was correct in withholding the information under regulation 10(5)(e) of the EIRs. As she is satisfied that all of the withheld information has been properly withheld under regulation 10(5)(e), she is not required to consider the application of regulation 10(5)(f) in this case.

DECISION

The Commissioner finds that Historic Scotland complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Pitlochry and Moulin Community Council.



Appeal

Should either Pitlochry and Moulin Community Council or Historic Scotland 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.

Margaret Keyse
Head of Enforcement
24 June 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.

...



The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

"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;

...

(e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and

...

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;
 - ...