

Decision Notice

Decision 033/2015: Mr Paul Hutcheon and Historic Scotland

Refurbishment or relocation of the First Minister's official residence

Reference No: 201400902

Decision Date: 16 March 2015



Scottish Information
Commissioner

Summary

On 6 January 2014, Paul Hutcheon of the Sunday Herald (Mr Hutcheon) asked Historic Scotland for information regarding the potential refurbishment or relocation of the First Minister's official residence. Historic Scotland withheld information under the exceptions at regulations 10(4)(e) (internal communications) and 10(5)(a) (international relations, defence, national security or public safety) of the EIRs.

After investigating, the Commissioner found that Historic Scotland was entitled to withhold the information under these exemptions. However, she also found that Historic Scotland had failed to provide Mr Hutcheon with an adequate level of advice and assistance when responding to his request and as such failed to comply with regulation 9(1) of the EIRs. Given the information contained in this Decision Notice, the Commissioner did not require any further action in respect of this breach.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) section 50(1)(a) (Information notices)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make environmental information available on request); 9(1) (Duty to provide advice and assistance); 10(1), (2), (4)(e) 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 Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 6 January 2014, Mr Hutcheon made a request for information to Historic Scotland. The information requested was:
 - (i) All studies and options papers on the possibility of moving the First Minister's official residence from Bute House to Governor's House.
 - (ii) How much Historic Scotland spent evaluating the possibility of moving the First Minister's official residence from Bute House to Governor's House? (Mr Hutcheon requested a breakdown of the costs, including any external parties in receipt of funds.)
 - (iii) All studies/papers on the extent of refurbishment required at Bute House from 1 January onwards.
2. Mr Hutcheon did not receive a response within 20 working days so he wrote to Historic Scotland on 24 February 2014, requesting a review.
3. Historic Scotland notified Mr Hutcheon of the outcome of its review on 24 March 2014. It withheld information under the exceptions at regulations 10(4)(e) (internal communications)

and 10(5)(e) (commercial confidentiality) of the EIRs. Historic Scotland also stated that it held no information which would address part (ii) of Mr Hutcheon's request.

4. On 28 April 2014, Mr Hutcheon wrote to the Commissioner and applied 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 Hutcheon stated he was dissatisfied with the outcome of Historic Scotland's review because he believed the exceptions had been incorrectly applied.

Investigation

5. The application was accepted as valid. The Commissioner confirmed that Mr Hutcheon 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.
6. Historic Scotland is an Executive Agency of the Scottish Ministers (the Ministers). 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.
7. On 1 May 2014, Historic Scotland was notified in writing that Mr Hutcheon had made a valid application. It was asked to send the Commissioner the information withheld from him. Historic Scotland provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Historic Scotland was invited to comment on this application and answer specific questions, including justifying its reliance on any provisions of the EIRs it considered applicable to the information requested.
9. When providing the withheld information, Historic Scotland stated that it was relying on regulation 10(5)(a) of the EIRs rather than regulation 10(5)(e). Its submissions focused on the exceptions in regulations 10(4)(e) and 10(5)(a).
10. During the investigation, Historic Scotland was asked to detail the searches it had carried out to identify and locate the information requested by Mr Hutcheon, and to provide evidence of the results of these searches. Historic Scotland did this, and carried out further searches. As a result, further documents falling within the scope of Mr Hutcheon's request were located.
11. The Commissioner also served an Information Notice on Historic Scotland under section 50(1)(a) of FOISA seeking further information necessary for her investigation, as Historic Scotland's submissions were unclear.
12. Mr Hutcheon was given an opportunity to provide any comments he wished to make. He provided submissions during the investigation.

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 Hutcheon and Historic Scotland. She is satisfied that no matter of relevance has been overlooked.

14. Eventually, having considered the outcomes of all of the additional searches and the additional information supplied following service of the Information Notice, the Commissioner was satisfied that the documents provided to her by Historic Scotland contained all of the information held by the authority falling within the scope of the Mr Hutcheon's request.

The withheld information

15. The information being withheld by Historic Scotland comprises of:
 - (i) measured drawings and concept plans of Bute House and Governor's House;
 - (ii) draft budget costs, and
 - (iii) a background appraisal document considering the options.
16. Historic Scotland applied regulation 10(4)(e) to all of these documents and additionally applied regulation 10(5)(a) to the drawings and plans.
17. The drawings supplied to the Commissioner include drawings of the two buildings as they exist at present. She is not satisfied that all of these could reasonably be said to relate to the consideration of options on the possibility of moving the First Minister's residence as described in the request, or the extent of refurbishment required at Bute House. She has considered the drawings in what follows only to the extent that she is satisfied that they fall within the scope of the request.

Application of the EIRs

18. It is clear from the authority's correspondence with both Mr Hutcheon 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 relates to the consideration of plans and measures with the potential to affect the environment (and in particular two listed buildings). The Commissioner is satisfied that it would fall within either paragraph (a) of the definition of environmental information contained in regulation 2(1) (as information on the state of the elements of the environment) or paragraph (c) of that definition (as information on measures affecting or likely to affect those elements).
19. Mr Hutcheon has not disputed this and the Commissioner will consider the information in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs

20. 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.
21. 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. Historic Scotland maintained that the information was excepted from disclosure in terms of regulations 10(4)(e) and 10(5)(a) of the EIRs.
22. The Commissioner will firstly consider the application of regulation 10(5)(a).

Regulation 10(5)(a) of the EIRs (public safety)

23. In terms of regulation 10(5)(a) of the EIRs, a Scottish public authority may refuse to make information available to the extent that its disclosure would, or would be likely to, prejudice substantially international relations, defence, national security or public safety. This exception must be interpreted in a restrictive way (regulation 10(2)(a)) and the public authority must apply a presumption in favour of disclosure (regulation 10(2)(b)).
24. Historic Scotland explained how the information withheld under this exception showed proposals for the design of the interior and exterior of Governor's House, and for the potential renovation of Bute House. These included the proposed location of the First Minister's office, Cabinet offices and private quarters, the potential materials to be used with regard to security and construction, full floor plans and all access points of the building.
25. Historic Scotland considered disclosing this information would pose a real danger and threat to the First Minister and Cabinet, along with the First Minister's staff, on the grounds of public safety. Disclosure of the information, Historic Scotland submitted, would reveal potential points of entry to the building and potential surveillance points within it. This would severely limit the Scottish Government's capacity to respond to threats effectively.
26. Historic Scotland acknowledged that there would always be some degree of security risk, given that the location of the First Minister's residence was in the public domain. It went on to argue that disclosure of this detailed information would be likely to require either the full revision of existing plans or increased security measures to deal with the resulting security risks.
27. The Commissioner has considered this information carefully, along with the extent to which relevant information is already in the public domain. In the circumstances, she accepts the disclosure of the withheld information would provide a real opportunity for exploitation of vulnerable areas, with a resulting substantial danger to those persons described by Historic Scotland. She accepts that there is a quantifiable risk of such danger, which could not be considered to be unduly remote. This would, in the Commissioner's view, amount to a likelihood of substantial prejudice to public safety. She is, therefore, satisfied that the exception applies.

The public interest test

28. Having agreed that the exception in regulation 10(5)(a) applies, the Commissioner is required to consider the public interest test required by regulation 10(1)(b) of the EIRs. The test 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.
29. Historic Scotland accepted some degree of public interest in disclosure of the information, in order to promote transparency.
30. However, Historic Scotland argued that disclosure of this information would not be in the public interest as it would interfere with the Scottish Government's ability to discharge its responsibilities effectively with regard to securing the safety of the First Minister, the Cabinet and Scottish Government staff. There was no public interest, it submitted, in putting the safety of Ministers and staff at risk.
31. Historic Scotland believed that, on balance, the public interest favoured withholding the information. It recognised that disclosure could be seen to enhance public scrutiny of the

public decision-making process, but concluded that the public interest would be best served by upholding the exception, to safeguard security measures in place and avoid increasing the level of risk to the safety of Ministers and staff.

32. Having accepted and balanced the competing public interests in all the circumstances of this case, the Commissioner finds that the public interest in making the withheld information (insofar as falling within the scope of the request) available is outweighed by that in maintaining the exception in regulation 10(5)(a) of the EIRs. Historic Scotland was therefore justified in withholding the information under that exception.
33. The Commissioner will now go on to consider the application of regulation 10(4)(e) of the EIRs to the remaining withheld information.

Regulation 10(4)(e) of the EIRs (internal communications)

34. Under regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to make available environmental information which comprises internal communications. In applying this exception, a Scottish public authority must comply with regulation 10(2) (see paragraph 22 above). As with all exceptions in the EIRs, the public interest test applies.
35. The information withheld under this exception was all information communicated, or intended for communication, between members of staff of Historic Scotland, and between Historic Scotland and other officials within the Scottish Government. Historic Scotland is an executive agency of the Scottish Government. Since all the relevant communication was internal, within the Scottish Government, the Commissioner is satisfied that the information comprises internal communications for the purposes of the EIRs and therefore falls within the scope of the exception.

The public interest test

36. Historic Scotland believed it would significantly prejudice the effective conduct of public affairs to disclose draft budgets and plans before any tender exercise was undertaken. There was no precise timescale for any such exercise, but one would be required once a final decision had been taken on the available options.
37. If the budgetary information were to be disclosed at this point, Historic Scotland submitted, companies tendering for the resulting project in the future would be aware of how much it would be willing to pay for those works and precisely what work was envisaged, making it hard to secure best value for money in any tendering exercise (given that tenderers would be likely to automatically seek to put in tenders with costs at or around the cost levels specified in the draft budget cost documents). This would not be in the public interest.
38. Historic Scotland also considered there to be a strong public interest in officials being able to consider all available options at the early stages of proposals, without facing any undue pressure externally. It submitted that they needed space to be able to debate and consider those proposals. They needed to consider all their merits or demerits, and to understand their possible implications, in terms of both cost and also design, before any decisions were taken as which options should be pursued.
39. Historic Scotland acknowledged that there was a public interest in knowing about and understanding the reasoning behind proposals to potentially change the residence of the First Minister and to promote openness and transparency. Mr Hutcheon expanded on this, noting that the Scottish Government had already stated that a possible move was under consideration (so it was not a secret). He believed the information he sought should include

relevant figures and an evidential basis for any particular course of action. He submitted that the public was entitled to know why a particular policy was being considered and the cost attached to any changes, noting that the public got regular briefings on costs when the Holyrood project was under construction.

40. Historic Scotland argued that it would not really help promote openness and inform public debate to disclose this particular information, particularly given it was in draft format and did not represent the final policy position (which was still to be decided). It pointed out that the Scottish Government had already disclosed the fact that a move to Governor's House was being considered, and had provided a broad outline cost to the media in 2012. It believed this met the public interest in openness in the circumstances.
41. After being served with the Information Notice, Historic Scotland further explained that there had never been any formal project to take this work forward. This had never been authorised, as there had been higher priorities, and so the work remained very much in its preliminary stages. Although no action had been discussed or taken since 2012, it was still anticipated that further work would be required on the options of either refurbishing Bute House or relocating the First Minister's residence. In that event, the Ministers submitted, the withheld information would remain relevant as a benchmark for any subsequent proposal and tendering exercise.
42. In all the circumstances narrated above, Historic Scotland concluded that the public interest in maintaining the exception outweighed that in disclosure of the information.
43. In considering the public interest test, the Commissioner accepts that there is a clear public interest in making information available on the subject matter of Mr Hutcheon's request. The locations of the First Minister's official residence and of Cabinet meetings are matters of inherent public interest. Considerable public funds would be involved should any work of this kind be taken forward. Both buildings are listed category A and both are situated within a World Heritage Site.
44. The Commissioner has also given careful consideration to the public interest in maintaining this exception and not making the information available. She acknowledges that work in this area is relatively undeveloped and, indeed, has never reached the stage of a formal project. It would have been helpful if Historic Scotland had explained this fully at the outset.
45. In the circumstances, the Commissioner considers it reasonable to approach this information on the basis that it will be required for future work in this area. It appears reasonable to accept that such further work will be required in the foreseeable future. She recognises that the information would be of continuing value in taking a project forward, as explained by the Ministers.
46. On balance, therefore, bearing in mind the relatively early stage of any work in this area and its likely continuing relevance, the Commissioner accepts that the public interest in making this information available is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs. Therefore, she finds that Historic Scotland was justified in withholding the information under that exception.
47. It is the Commissioner's view that the disclosure of this information may harm the frankness with which comments can be made and discussions about the potential move can take place in future. She also considers that disclosure of the information may harm or prejudice commercial negotiations with potential tenderers and its disclosure therefore would be detrimental to the public interest.

Regulation 9(1) of the EIRS – Duty to provide advice and assistance

48. Regulation 9(1) of the EIRs provides that a Scottish public authority shall “provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.”
49. As already explained, further searches were required during the investigation to identify and locate all information held by Historic Scotland falling within the scope of Mr Hutcheon’s request. The Commissioner would normally expect an authority to locate all the relevant information it holds at the outset, or, failing that at review. Only in exceptional circumstances would she expect additional information to be located during her investigation.
50. In this case, the additional information by itself did not give sufficient clarity to enable a decision to be taken about whether Historic Scotland had complied with the EIRs, and it was only the serving of an Information Notice that resulted in clarification.
51. What concerns the Commissioner is that it took the service of an Information Notice, to obtain from Historic Scotland sufficiently clear and detailed explanations about the information it held to enable a decision to be taken. It is also of concern to the Commissioner that much of those explanations was not provided to Mr Hutcheon as advice and assistance to help him understand Historic Scotland’s response to his request.
52. It is the Commissioner’s view that that this should have been apparent to Historic Scotland at the time. In not providing such advice and assistance, the Commissioner finds that Historic Scotland failed to comply with regulation 9(1) of the EIRs.

Decision

The Commissioner finds that Historic Scotland partially failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Hutcheon.

The Commissioner finds that Historic Scotland was entitled to withhold the information sought by Mr Hutcheon under regulations 10(4)(e) and 10(5)(a) of the EIRs.

For the reasons stated in this Decision Notice, the Commissioner also finds that Historic Scotland failed to provide Mr Hutcheon with an adequate level of advice and assistance when responding to his request and thereby failed to comply with regulation 9(1) of the EIRs. Given the information contained in this Decision Notice, the Commissioner does not require any steps to be taken in respect of this failure, in response to Mr Hutcheon’s application.

Appeal

Should either Mr Hutcheon or Historic Scotland 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.

Rosemary Agnew
Scottish Information Commissioner

16 March 2015

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

50 Information notices

- (1) Where the Commissioner –
- (a) has received an application under section 47(1) ...
- that officer may give the authority notice in writing (referred to in this Act as “an information notice”) requiring it, within such time as is specified in the notice, to give the officer, in such form as may be so specified, such information relating to the application, to compliance with this Act ... as is so specified.
- ...

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.
- ...

9 Duty to provide advice and assistance

- (1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...

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

...

- (e) the request involves making available internal communications.

- (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;

...

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