

Decision Notice 131/2021

2015 report and findings relating to land at Leuchatsbeath, Fife

Applicant: The Applicant

Public authority: Fife Council

Case Ref: 202001365



Scottish Information
Commissioner

Summary

The Council was asked for a copy of the report and findings from a land investigation carried out at Leuchatsbeath in 2015.

The Council withheld the information requested, claiming it was commercially confidential.

The Commissioner investigated and found that the information was not commercially confidential. He ordered the Council to disclose the information.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b), (c), (d) and (f) of definition of “environmental information” (Interpretation); 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 Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 9 May 2020, the Applicant made a request for information to Fife Council (the Council). The information requested was a copy of the report and findings produced following a land investigation/contamination survey carried out at Leuchatsbeath, Fife, in 2015.
2. The Council (Economy, Planning and Employability Services) responded on 25 May 2020, withholding the report as it was considered commercially sensitive but informing him that no significant sources of contamination were encountered, no pollution linkages were found, and the land was suitable for its current use as no unacceptable risks to human health, buildings or the water environment were identified.
3. The Council (Information Requests) also responded to the Applicant on 25 May 2020, to inform him that a formal response to his request would be issued to him as soon as possible.
4. The Council responded on 1 June 2020, under the EIRs, withholding the information by virtue of regulation 10(5)(e) on the basis that it was commercially confidential.
5. On 1 June 2020, the Applicant wrote to the Council, requesting a review of its decision as he did not consider the information was commercially sensitive and believed it was in the wider public interest to disclose it.
6. The Council notified the Applicant of the outcome of its review on 29 June 2020. It upheld its original decision that the information should be withheld under regulation 10(5)(e) of the EIRs as it was commercially confidential, noting that disclosure would affect the landowner’s economic interests. It also concluded that, on balance, the public interest was better served by withholding the information.
7. On 16 November 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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. The Applicant stated he was dissatisfied with the outcome of the Council’s review because he did not agree

with the exception being used by the Council and considered the report to be of wider interest to the public (particularly given that there was a “substantial” planning application currently being considered by the Council for an adjacent site, which could involve disturbance to the land covered by the report).

Investigation

8. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
9. On 30 November 2020, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the information withheld from the Applicant. The Council provided the information and the case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and to answer specific questions. These related to the reasons why the Council consider regulation 10(5)(e) was engaged and why it considered the public interest favoured withholding the information.

Commissioner’s analysis and findings

11. 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 him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

Application of EIRs

12. The Council considered the Applicant’s request under the EIRs, having concluded that the information requested was environmental information as defined in regulation 2(1) of the EIRs and applied the exemption in section 39(2) of FOISA. The Applicant has not disputed the Council’s decision to deal with the request under the EIRs. The Commissioner is satisfied that the information is environmental (paragraphs (a), (b), (c), (d) and (f) of the definition) and will consider the Council’s handling of the case in what follows solely under the EIRs.

Regulation 5(1) of the EIRs

13. 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. This obligation relates to information held by the authority when it receives a request.
14. 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 (regulation 10(1)(b)). It must interpret any exceptions restrictively and apply a presumption in favour of disclosure (regulation 10(2)).
15. In responding to the Applicant, both initially and on review, the Council withheld information under regulation 10(5)(e) of the EIRs (confidentiality of commercial or industrial information).

Regulation 10(5)(e) of the EIRs: confidentiality of commercial or industrial information

16. Regulation 10(5)(e) 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.
17. *The Aarhus Convention: An Implementation Guide*¹, which offers guidance on the interpretation of the Convention from which the EIRs are derived, notes (at page 88) that the first test for considering this exception is whether national law expressly protects the confidentiality of the withheld information. The law 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:
 - (i) Is the information publicly available?
 - (ii) Is the information commercial or industrial in nature?
 - (iii) Does a legally binding duty of confidence exist in relation to the information – express or implied?
 - (iv) Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

Is the information publicly available?

19. In its submissions, the Council confirmed that the withheld information was not publicly available and had not been shared with any other party. It noted that it owned the land at Leuchatsbeath and that the Council Service which "owned" the land had also not had sight of the requested information.
20. The Applicant believed that, were the land to be sold, the requested report would be shared with any potential buyer, but the Council confirmed that reports produced to carry out the Council's legal duty under Part IIA (Contaminated land) of the Environmental Protection Act 1990 (the EPA) would not be shared with any potential purchaser.
21. The past use of the land at Leuchatsbeath as a landfill site is in the public domain. The Commissioner accepts that the withheld information is not, however, in the public domain.

Is the information commercial or industrial in nature?

22. The Council submitted that the information was the outcome of a contaminated land survey, carried out on commercial/industrial land currently for sale.
23. The Council also submitted that the commercial interests of two parties would be affected by the disclosure of the requested information: the landowner (Fife Council Economic Development Service) and a local commercial business whose premises were connected to the land.

¹ https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

24. As background information, the Applicant highlighted in his submissions that this commercial business had a substantial planning application lodged with the Council that had generated many objections. The Applicant was concerned that any building work involved in this project might disturb the old landfill site and create a risk to the public.
25. The Council confirmed that views on the disclosure of the report were sought from the owning department, which did not provide specific comment (not having seen the withheld information) but did confirm the land was currently available for sale. The Council did not seek the view of the commercial business, as it had not had sight of the report and was not the landowner.
26. The Council submitted that, in the circumstances, disclosure would have a negative impact on the landowner (i.e. the Council) in terms of property valuation. It also considered disclosure would have a negative impact on the local business as it believed the report (or misinterpretation of its contents) would be used to cause harm to this company.
27. Given the context described above, the Commissioner accepts that the information can be considered commercial in nature.

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

28. In the Commissioner's view, confidentiality "provided by law" will include confidentiality imposed on any person under the common law of confidence, under a contractual obligation or by statute.
29. The Council highlighted that it has a legal duty to inspect its area to identify and remediate contaminated land under Part IIA of the EPA. It stated that the Leuchatsbeath tip at Cowdenbeath was one of the sites investigated as part of its contaminated land inspection programme.
30. The Council's view is that inspections that are required to be carried out for this purpose are deemed to be confidential and are not shared with any other party. It considers an implied duty of confidence applies to such reports, to allow the Council to carry this work out without causing damage to land valuation (which it considered likely here, if the information were released into the public domain).
31. The Commissioner has considered the withheld information, along with the submissions and can find nothing therein that evidences an explicit obligation of confidence. Indeed, within the EPA² there is an explicit requirement in section 78R (Registers) that, where contaminated land is identified, specified details of the condition of the land and the remedial actions required or carried out on it are included in a register that is available to the public.
32. Section 78T³ (Exclusion from registers of certain confidential information) of the EPA allows for commercially confidential information being excluded from the register, but there is a statutory process to be followed before this can be done. While the site at Leuchatsbeath does not appear in such a register (there are no contaminated sites registered in Fife at present), these arrangements do not suggest that there is an inherent expectation of confidentiality in respect of all information gathered by the local authority in pursuance of its functions under Part IIA of the EPA. Nor does anything else in Part IIA of the EPA or supporting statutory guidance appear to raise such an expectation. The Commissioner

² [Environmental Protection Act 1990 \(legislation.gov.uk\)](https://legislation.gov.uk)

³ [Environmental Protection Act 1990 \(legislation.gov.uk\)](https://legislation.gov.uk)

acknowledges that an explicit obligation of commercial confidentiality might arise, in relation to specific information designated as such by the person to whom (or to whose business) it relates, but such a situation has not been evidenced (or even identified) to the Commissioner in this case.

33. Taking all of this into consideration, along with the content of the withheld information (which does not suggest that there is any basis for regarding it as inherently confidential), the Commissioner does not accept that there is an explicit or implied duty of confidence in relation to the requested information.

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

34. The term “legitimate interest” is not defined in the EIRs. In the Commissioner’s view, the interest in question should be financial, commercial or otherwise “economic” in nature. The prejudice to that interest must be substantial: in other words, it must be of real and demonstrable significance
35. As indicated above, the Council highlighted its view that disclosure of the information would affect the valuation of the land concerned.
36. The Council also considered disclosure of the report would have a negative economic impact on a local business. It was concerned that the contents of the report (or misinterpretation thereof) would be used to cause harm to this company.
37. The Commissioner has considered the arguments put forward by the Council and the Applicant, as well as the withheld information itself.
38. The Commissioner is not persuaded that the Council has made a compelling enough argument that disclosure of the withheld information would be capable of causing the harm envisaged, either to the landowner (the Council) or the neighbouring commercial business.
39. The past existence of a landfill site, in this area, is in the public domain, as is the fact that an environmental survey was carried out on the land in 2015. The Commissioner considers any potential buyer would likely carry out the necessary research and avail themselves of the facts before entering negotiations to purchase.
40. Were the land identified as contaminated, for the purposes of Part IIA of the EPA, and had any consequential enforcement action been taken in relation to it, the public would be able to access the public register of contaminated land where details of such matters would be recorded (subject to the relevant processes being followed in relation to information considered commercially confidential or contrary to the interests of national security).
41. In relation to a site not in the register, the Commissioner must consider the content of any withheld information. In this case, as indicated above, he can find no basis for classifying it as confidential. Given the obligation to publish information where contamination is found, it can hardly be presumed that information finding an absence of the required contamination will be suitable for withholding from the public, in the absence of specific, relevant substantial harm as a consequence of disclosure. The information under consideration here relates largely to the site investigation processes followed and the conclusions reached. On the face of it, the information does not relate to the financial, commercial or economic interests of any particular person or business.
42. The Council has argued that the contents of the report may be misinterpreted or misunderstood. The Commissioner considers that it is not uncommon for the work of public

bodies to be misunderstood or misinterpreted, but this is not, by itself, a reason for withholding information under the EIRs. It is always open to the public authority to provide context or explanation to address any scope for this happening.

43. The Council in its submissions has not indicated how disclosure of the withheld information would harm the commercial interests of any person or business, or provided any evidence of how this harm would be brought about. Any proposal to develop this or any adjacent land would be governed by the due processes of the planning system, with all relevant safeguards.
44. Taking account of the actual information withheld and the submissions provided by the Council, the Commissioner is unable to accept that disclosure would cause the substantial prejudice required by regulation 10(5)(e). Consequently, he cannot accept that the Council can justify the application of the exception in regulation 10(5)(e) to the withheld information.
45. Given that the Commissioner has found that the exemption in regulation 10(5)(e) was incorrectly applied to the information withheld by the Council, the Commissioner is not obliged to, and has not gone on to, consider the public interest test required by regulation 10(1)(b) of the EIRs.
46. The Commissioner finds that, by not making the information available, the Council failed to comply with regulation 5(1) of the EIRs. He requires the Council to disclose this information to the Applicant.

Decision

The Commissioner finds that Fife Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs), specifically regulation 5(1), in responding to the information request made by the Applicant.

The Commissioner finds that the Council was not entitled to withhold the information under regulation 10(5)(e) of the EIRs.

The Commissioner therefore requires the Council to provide the Applicant with the information in the report he requested, by **18 October 2021**.

Appeal

Should either the Applicant or the Council 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.

Enforcement

If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

2 September 2021

Appendix 1: Relevant statutory provisions

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

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- (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;
- (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-

...

 - (e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;

...

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