

Decision Notice

Decision 153/2016: Mr Robert Kirkwood and City of Edinburgh Council

Legal advice

Reference No: 201502336

Decision Date: 11 July 2016



Scottish Information
Commissioner

Summary

On 7 October 2015, Mr Kirkwood asked the City of Edinburgh Council (the Council) for legal advice relating to an enforcement notice.

The Council withheld the information. Following a review, Mr Kirkwood remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council was correct to withhold the information as disclosure would be likely to substantially prejudice future enforcement action.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information of request); 10(1), (2) and (5)(b) (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 7 October 2015, Mr Kirkwood made a request for information to the Council. He asked for the legal advice relating to an enforcement notice for odour nuisance which was issued and subsequently withdrawn by the Council.
2. The Council responded on 3 November 2015. The Council withheld the information under regulation 10(5)(b) of the EIRs, on the grounds that disclosure would, or would be likely to, prejudice substantially its ability to take future enforcement action.
3. On 10 November 2015, Mr Kirkwood wrote to the Council requiring a review of its decision. He believed disclosure to be in the public interest, with a view to informing the public as to when effective enforcement action could be taken
4. The Council notified Mr Kirkwood of the outcome of its review on 8 December 2015, upholding its application of regulation 10(5)(b). It explained why it had concluded the public interest favoured maintaining this exception
5. On 10 December 2015, Mr Kirkwood wrote to the Commissioner. He applied 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 specified modifications. Mr Kirkwood stated that he was dissatisfied with the outcome of the Council's review because he did not believe it had addressed all of his concerns: he remained of the view that the public interest favoured disclosure.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Kirkwood 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.
7. On 21 January 2016, the Council was notified in writing that Mr Kirkwood had made a valid application and was asked to send the Commissioner the information withheld from Mr Kirkwood. The Council 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. The Council was invited to comment on this application, focusing on its reliance on regulation 10(5)(b) of the EIRs.
9. The Council provided submissions, and responded to further questions on its application of regulation 10(5)(b).
10. Mr Kirkwood was also asked for any further submissions he wished to make, but did not add anything in addition to the comments provided in his application.

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 her by both Mr Kirkwood and the Council. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

12. It is evident from the subject matter (legal advice pertaining to an odour nuisance enforcement notice) that any information falling within the scope of Mr Kirkwood's request would be environmental information, as defined in regulation 2(1) of the EIRs (paragraph (a) of the definition, as information relating to 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). Mr Kirkwood has not disputed this and the Commissioner will consider the Council's handling of the request solely in terms of the EIRs.

Regulation 10(5)(b)

13. Regulation 10(5)(b) 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 course of justice, the ability of an individual to receive a fair trial or the ability of any public authority to conduct an inquiry or a criminal or disciplinary nature.
14. As with all exceptions in regulation 10, it is subject to the public interest test in regulation 10(1)(b) and, in line with regulation 10(1)(a), must be interpreted in a restrictive way with a presumption in favour of disclosure.
15. The Council was of the view that the advice should be excepted from disclosure within the terms of regulation 10(5)(b), because its disclosure would be likely to cause substantial prejudice to the course of justice (in the form of future enforcement action and associated litigation).

16. The Council submitted that the information being requested was advice from its solicitors, which was legally privileged. It was prepared in contemplation of litigation, setting out how the Council should proceed with a case relating to the service of an enforcement notice in terms of the relevant legislation.
17. The Council continued that disclosure would be of significant advantage for organisations that might be subject to enforcement action, which would have access to legal advice received by the Council in relation to the validity and enforceability of such notices.
18. The Council believed there would be a substantial prejudice to future enforcement processes, and subsequent litigation, through disclosure of the requested information. It submitted that it had the right to prepare for enforcement cases in private and obtain legal advice (which should remain privileged and not be publicly available). The Council would lose this right and, consequently, the ability to prepare adequately for the legal process, if such advice were disclosed publicly.
19. The Council explained the context of the advice being obtained and the notice withdrawn, which it would not be possible to describe in detail here without disclosing potentially excepted information. It submitted that the legal advice highlighted and examined issues which, if publicly known, would make it more difficult for it to carry out its enforcement duties. If the issues became publicly known, there was a risk that operators would seek to focus on the issues within that advice, which they might not have previously considered. It would therefore directly impact the Council's ability to detect and demonstrate breaches of the relevant legislation and code of practice. The Council believed this would substantially prejudice the course of justice.
20. In support of its case, the Council highlighted the relevance of the advice to future enforcement action and to related legal strategies and approaches it might adopt in future. Disclosure had the potential to limit its ability to pursue these. Its position could also be undermined, it argued, if it became known that it was not following relevant advice in a particular situation.
21. The Council noted the continuing potential for litigation in this and similar enforcement cases. It referred to previous decisions of the Commissioner, although it is difficult to see how these underscore the risk of litigation in these particular circumstances.
22. To a large extent, the Council's submissions are speculative. Subsequent submissions improve upon the original set provided to the Commissioner, but they still appear to expect the Commissioner to take a lot for granted in relation to the likelihood of harm.
23. That said, the Commissioner has considered the submissions she has carefully, together with the withheld information. The advice was clearly provided in confidence, within a solicitor/client relationship. Having considered the information, it would appear to be reasonable to accept that it is likely to be of relevance to future enforcement activity the Council might reasonably be expected to undertake. Given the nature of the enforcement activity under consideration, the Commissioner is also prepared to accept that there is a reasonable risk of litigation following activity of this kind. In all the circumstances, she accepts that disclosure of the withheld, privileged, information would be likely to be substantially prejudicial to the course of justice. Consequently, the Commissioner finds that the information was properly excepted from disclosure under regulation 10(5)(b) of the EIRs.

Public interest test

24. Having found that the Council correctly applied the exception in regulation 10(5)(b), 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.
25. The Council acknowledged that disclosure of the withheld information would evidence the Council's basis for its decision making process in the case in question. It acknowledged that there was therefore a strong public interest in disclosure.
26. However, the Council stated that it was acting on behalf of the citizens of Edinburgh when seeking to prepare and pursue all enforcement litigation. It was therefore essential that it could prepare for legal action in private, confident that privileged legal advice would not be provided to the other parties through Freedom of Information legislation. Disclosure, the Council reiterated, would be of significant advantage for operators that might be subject to enforcement action. The Council concluded that the public interest in maintaining the exception outweighed disclosure of the legal advice.
27. In his application to the Commissioner, Mr Kirkwood identified a public concern that the code of practice relevant to this particular enforcement action might no longer be fit for purpose. The disclosure of the legal advice, Mr Kirkwood contended, would either confirm or deny that this was the case, and would allow the community to press for a review of the code should that be appropriate.
28. Having considered all the circumstances of the case, on the arguments she has received, the Commissioner finds the public interest considerations to be finely balanced. The Council itself has acknowledged the strong public interest in understanding its decision making and the underpinning legal advice. On the other hand, the Commissioner has long recognised the public interest in maintaining the confidentiality of privileged communications, and in this case she has acknowledged the relevance of the withheld information to future enforcement action and related litigation. In areas such as that addressed by this enforcement action, in particular, there is a clear public interest in the Council being free to take the most appropriate and effective action in the interests of its citizens.
29. On balance, the Commissioner finds the public interest in maintaining the exception in regulation 10(5)(b) outweighs that in making the information available. Consequently, she accepts that the Council was correct to withhold the information under regulation 10(5)(b) of the EIRs.

Decision

The Commissioner finds that the City of Edinburgh Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr Kirkwood.

Appeal

Should either Mr Kirkwood or the City of Edinburgh 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.

Margaret Keyse
Head of Enforcement

11 July 2016

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-

(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.

...

(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-

...

(b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;

...

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