

Decision Notice

Decision 141/2018: Mr Graham Garfoot and Highlands and Islands Enterprise

Condition of foundations of various tows at Cairngorm Mountain

Reference No: 201800830

Decision Date: 31 August 2018



Scottish Information
Commissioner

Summary

HIE was asked for a copy of the ADAC Structures Condition Report 2017 into foundations of various tows at Cairngorm Mountain.

HIE refused to provide the information, considering it to be both confidentially commercial and the intellectual property of the report's author (and claiming substantial prejudice on both counts).

The Commissioner investigated and found that HIE was not entitled to withhold the information under the exceptions claimed, and so had failed to respond to the request for information in accordance with the EIRs. The Commissioner required HIE to disclose the report.

Relevant statutory provisions

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 available environmental information on request); 10(1), (2), (5)(c) and (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 10 March 2018, Mr Garfoot made a request for information to Highlands and Islands Enterprise (HIE). The information requested was a copy of the ADAC Structures (ADACS) 2017 report into lift infrastructure.
2. HIE responded on 6 April 2018, confirming that the information it held for this request was a "Condition report into foundations of various tows at Cairngorm Mountain" (July 2017). Having considered the request under the EIRs, HIE refused to provide the information under regulation 10(5)(e) as it considered it to be commercially confidential. As the report was deemed to be a working document, HIE considered disclosure would have a direct impact on the current operator as actions were still being carried out.
3. On 11 April 2018, Mr Garfoot wrote to HIE requesting a review of its decision. As there was no other operator on Cairngorm, he failed to understand why the information was commercially sensitive, unless work recommended in previous years had still not been completed (which, in his view, would be a health and safety issue).
4. HIE notified Mr Garfoot of the outcome of its review on 4 May 2018, upholding its original decision with modification. HIE now also wished to rely on regulation 10(5)(c), considering the information to be the intellectual property of the report's author. HIE believed disclosure would cause substantial harm to the legitimate economic interests of both ADACS and Cairngorm Mountain Limited (CML) and that the public interest favoured non-disclosure. HIE stated the report did not suggest there were any potential health and safety issues.
5. In a response to HIE on 13 May 2018, Mr Garfoot commented that, as the infrastructure was owned by HIE and not CML, he failed to see how disclosure of the report would affect CML's

economic interests, unless it highlighted faults which required closing the infrastructure for repair or removal. While ADACS might hold copyright, Mr Garfoot believed the reports were the property of HIE. Mr Garfoot also noted that the corresponding reports for 2015 and 2016 had been publicly disclosed, concluding that the only reason for non-disclosure of the 2017 report was that recommendations in the earlier reports had not yet been rectified (which, in his view, would become a health and safety issue).

6. On 13 May 2018, Mr Garfoot wrote to the Commissioner's office, applying to the Commissioner 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. Mr Garfoot stated he was dissatisfied with the outcome of HIE's review because he disagreed with its claim that disclosure would cause an economic problem for either ACADS or CML, given that the reports for the two previous years had been publicly disclosed.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr Garfoot 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.
8. On 18 June 2018, HIE was notified in writing that Mr Garfoot had made a valid application. HIE was asked to send the Commissioner the information withheld from him. HIE provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. HIE was invited to comment on this application and answer specific questions, with particular reference to the exceptions claimed in correspondence with Mr Garfoot.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both Mr Garfoot and HIE. He is satisfied that no matter of relevance has been overlooked.

Handling in terms of the EIRs

11. It is clear from the HIE's correspondence with both Mr Garfoot 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. This view is confirmed by consideration of the information itself. The information relates to a report created following an inspection of the condition of the foundations of various towers on Cairngorm Mountain, and 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, in particular land and landscape) or paragraph (c) of that definition (as information on measures affecting or likely to affect, as well as being designed to protect, those elements). Mr Garfoot 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 – Duty to make environmental information available

12. Regulation 5(1) of the EIRs 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 that is held by the authority when it receives a request.
13. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
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, but only if (in all the circumstances) the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

Regulation 10(5)(c) of the EIRs

15. HIE submitted that the information withheld was excepted from disclosure by virtue of regulation 10(5)(c) of the EIRs.
16. Regulation 10(5)(c) 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 intellectual property (IP) rights.
17. As with all of the exceptions contained within regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). As noted above, even where the exception applies, the information must be disclosed 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)).
18. As the Commissioner's guidance on the exception in regulation 10(5)(c) states,¹ in order to establish that disclosure would, or would be likely to, prejudice substantially IP rights, a public authority must demonstrate that:
 - (i) the environmental information is protected by IP rights;
 - (ii) the IP right holder would suffer harm. It is not enough to show that IP rights would be infringed – disclosure must either prejudice substantially, or be likely to prejudice substantially, the IP rights;
 - (iii) the harm would result from the of the IP rights, for example by the third party losing control over how the information is used and by whom; and
 - (iv) the harm could not be prevented by enforcing the IP rights.

Is the material protected by IP rights?

19. IP rights arise when owners are granted exclusive rights to certain intangible assets. There are many forms of IP rights, but those most relevant to requests under the EIRs will be

¹ [http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/EIRsexceptionbriefings/Regulation10\(5\)\(c\)/Regulation10\(5\)\(c\)Intellectualpropertyrights.aspx](http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/EIRsexceptionbriefings/Regulation10(5)(c)/Regulation10(5)(c)Intellectualpropertyrights.aspx)

copyright, database rights, and copyright in databases. Copyright covers a wide range of recorded information, including reports produced by consultants.

20. HIE submitted that the report was protected by copyright, which was the IP of its author. HIE considered disclosure of the report would be likely to substantially prejudice the author as this would allow competitors to view and benefit from its appraisal methodology in a manner not otherwise available.
21. The Commissioner has also given consideration to HIE's submissions on copyright. The report is certainly protected by copyright. HIE has not provided any evidence to establish who holds copyright in the report, but it will be the author unless provision was made to the contrary when HIE commissioned it.

The IP right holder would suffer harm

22. Disclosure of copyrighted material in response to a request for information does not, by itself, breach copyright law. As a result of the Freedom of Information (Scotland) Act 2002 (Consequential Modifications) Order 2004, which was made by the UK Parliament, Scottish public authorities may disclose copyright information in response to a request for information under FOISA or the EIRs, without breaching the Copyright, Designs and Patents Act 1988 (CDPA). Section 50 of the CPDA states that if a particular "act" (e.g. disclosure of information in response to a request under FOISA/the EIRs) is required by an Act of Parliament, then the carrying out of that act does not infringe copyright. The usual copyright restrictions will apply to the subsequent use of the information by the recipient.
23. In any event, substantial prejudice to IP rights will require something more than merely their infringement. There are statutory processes available for dealing with such infringements.
24. Taking regard of all of the above, and bearing mind that HIE has essentially said nothing more than that disclosure would result in a copyright infringement, the Commissioner is not satisfied that there is any basis for concluding that there is a risk of substantial prejudice to IP rights as a result of disclosing the withheld information. Consequently, HIE was not entitled to rely on regulation 10(5)(c) in this case. Having found that the exception does not apply, the Commissioner is not required to go on to consider the public interest test.
25. As HIE is also withholding the information under the exception in regulation 10(5)(e) of the EIRs, the Commissioner will now go on to consider the application of that exception.

Regulation 10(5)(e) of the EIRs

26. The Council submitted that the withheld information was excepted from disclosure by virtue of regulation 10(5)(e) of the EIRs.
27. 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.
28. Again, as with all of the exceptions contained within regulation 10, a Scottish public authority applying this exception must interpret the exception in a restrictive way (regulation 10(2)(a)) and apply a presumption in favour of disclosure (regulation 10(2)(b)). As noted above, even where the exception applies, the information must be disclosed 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)).

29. The Aarhus Convention: an Implementation Guide² (which offers guidance on the interpretation of the Aarhus Convention, from which the EIRs are derived) notes (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 that type of information 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.
30. 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 commercial or industrial in nature?
 - (ii) Does a legally binding duty of confidence exist in relation to the information?
 - (iii) Is the information publicly available?
 - (iv) 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?

31. HIE submitted that the withheld information was commercial in nature as it related to the condition and maintenance of key assets owned by CML, and was contained in a report prepared as part of ADACS's business of providing consultancy services.
32. Having considered the withheld information, which comprises a report of findings following an inspection of the condition of the foundations of the various towers on Cairngorm Mountain, which was carried out in the course of a business arrangement with ADACS, the Commissioner accepts that the information is commercial in nature, for the reasons argued by HIE.

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

33. In the Commissioner's view, confidentiality "provided for by law" will include confidentiality imposed on any person under the common law of confidence, under a contractual obligation or by statute.
34. HIE submitted that, following consultation with Natural Retreats, the company which manages CML, Natural Retreats had expressed an expectation of confidentiality in relation to the report and did not wish it disclosed. This implied duty of confidentiality, HIE stated, protected CML's legitimate economic interests..
35. HIE explained that Natural Retreats were previously consulted regarding the disclosure of the 2015 and 2016 reports, and while it had waived its rights to commercial confidentiality in respect of both of those reports, it had not done so in respect of the 2017 report. The earlier reports were described as "significantly more historic in context."
36. HIE also argued that, as the report was commissioned by and prepared for CML, a similar implied duty of confidentiality was owed to ADACS by CML, and this protected ADACS's legitimate economic interests.
37. For a duty of confidence to be owed under the common law, HIE must have received the information in circumstances which imposed an obligation on it to maintain confidentiality.

² http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

38. The Commissioner has considered this question carefully. It is entirely conceivable that information provided to the client following the commissioning of work from a third party consultant may be provided under a legal obligation of confidence. However, HIE has provided no evidence to support the existence of an implied duty of confidentiality in this case, other than a reference to the retrospective views of Natural Retreats on the matter.
39. Natural Retreats was not the commissioning client and no evidence has been offered of ADACS's views on CML sharing the report with Natural Retreats, or as to Natural Retreats sharing it more widely. The situation is relatively complex, involving at least two parties in addition to CML and ADACS (the parties directly involved in the commissioning of the report) with an interest in – and in possession of – the report. The interests of ADACS in the matter cannot necessarily be seen as the same as those of CML and/or Natural Retreats. In the circumstances, it appears to the Commissioner inconceivable that if confidentiality had been a concern to any of the affected parties, expectations as to who could have the report would not have been set clearly, presumably in writing. Nothing of the kind has been evidenced by HIE.
40. Given the vagueness with which any assumptions of confidentiality have been expressed in this case, and that retrospectively, the Commissioner is not satisfied that the report was provided at any stage under a legally binding duty of confidence. The Commissioner cannot, therefore, accept that the information is excepted from disclosure under regulation 10(5)(e).
41. As the Commissioner has found that the exception in regulation 10(5)(e) does not apply, he is not required to go on to consider whether the information is publicly available, whether disclosure would cause harm to any legitimate economic interest that may exist, or the public interest test.
42. The Commissioner requires HIE to disclose the report to Mr Garfoot.

Decision

The Commissioner finds that Highlands and Islands Enterprise (HIE) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Garfoot.

The Commissioner has decided that HIE was not entitled to withhold the information requested under regulations 10(5)(c) and (e) of the EIRs, and so failed to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires HIE to disclose the information requested to Mr Garfoot by **15 October 2018**.

Appeal

Should either Mr Garfoot or Highlands and Islands Enterprise 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 Highlands and Islands Enterprise (HIE) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that HIE has failed to comply. The Court has the right to inquire into the matter and may deal with HIE as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

31 August 2018

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-

...

(c) intellectual property rights;

...

(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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