

Decision Notice

Decision 080/2019: Mr P and North Ayrshire Council

Hunterston Power Station

Reference No: 201802115

Decision Date: 22 May 2019



Scottish Information
Commissioner

Summary

The Council was asked for planning files related to Hunterston power station.

After an application was made to the Commissioner, the Council disclosed some information, but with some information removed on the basis that disclosure would substantially prejudice national security. The Commissioner investigated and found that the Council was not entitled to withhold all of the information under this exception; this information was disclosed during the investigation. The Commissioner was satisfied that the remaining information was excepted from disclosure.

The Commissioner also found that the Council failed to respond to the request within the prescribed timescale.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 5(1) and (2) (Duty to make environmental information available on request); 7(1) and (2) (Extension of time); 10(1), (2) 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 December 2017, Mr P made a request for information to North Ayrshire Council (the Council). Mr P requested copies of 25 planning files, all relating to Hunterston power station.
2. On 20 December 2017 and 18 January 2018, Mr P wrote to the Council, requesting a review on the basis that it had failed to respond to his request.
3. The Council responded to Mr P's requirement for review of 20 December 2017 on 22 January 2018. The Council's review was restricted to consideration of timescales. The Council concluded that the requirement for review had been premature and consequently found no failing in terms of regulation 5(2)(a) of the EIRs at the time the review was sought.
4. On the same day, Mr P acknowledged the Council's reply, but stated that he still sought the documents requested.
5. On 25 January 2018, the Council acknowledged Mr P's correspondence of 22 January 2018. The Council confirmed that it would be processing his request in terms of the EIRs.
6. On 7 February 2018, the Council provided notice in terms of regulation 7(1) of the EIRs that, due to the volume and complexity of Mr P's request, it required an extension of the statutory 20 working days. It informed him that it would respond to his request by 7 March 2018.
7. On 9 March 2018, Mr P wrote to the Council, requesting a review of on the basis that it had failed to respond.
8. On 16 March 2018, Mr P applied to the Commissioner for a decision on the basis that the Council had failed to respond to his request.

9. The Council notified Mr P of the outcome of its review on 28 March 2018. The Council stated that the information requested was excepted from disclosure under regulation 10(5)(a) of the EIRs, for reasons of national security and public safety.
10. On 29 March 2019, Mr P wrote to the Council, expressing his dissatisfaction with the Council's response to his request, explaining that the information requested was previously available to view online. Mr P highlighted a number of files that he argued did not pose a security threat, largely as the buildings in question had since been demolished.
11. The Council responded on 6 April 2018. It acknowledged that some of the planning files had been made available online (those post-dating the introduction of the ePlanning system), while reiterating its security concerns in relation to making the information available in response to Mr P's request.
12. On 26 July 2018, the Council reviewed the withheld documentation and reconsidered its application of regulation 10(5)(a) to the information. It acknowledged to the Commissioner that the exception should not have been applied in a blanket fashion.
13. On 13 and 20 September and 16-19 October 2018, the Council provided Mr P with tranches of information falling within the scope of his request. Some of the information supplied was redacted on the basis that regulations 11(2) (Personal data) or 10(5)(a) of the EIRs applied. The Council withheld signatures and detailed site plans, elevations and details of buildings or structures.
14. On 22 November 2018, Mr P wrote to the Commissioner's office, withdrawing his original application and making a new application on the basis that he remained dissatisfied with the Council's response.
15. Mr P applied 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 P stated he was dissatisfied with the outcome of the Council's review. Mr P was not satisfied with the redactions made to the information supplied and the time taken to respond to his request.

Investigation

16. The application was accepted as valid. The Commissioner confirmed that Mr P 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.
17. On 12 December 2018, the Council was notified in writing that Mr P had made a valid application. The Council provided the Commissioner the information withheld from Mr P and the case was allocated to an investigating officer.
18. 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, focusing on the points raised by Mr P in his application.
19. There was an additional disclosure to Mr P on 25 January 2019.

Commissioner's analysis and findings

20. 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 Mr P and the Council. He is satisfied that no matter of relevance has been overlooked.
21. Mr P was not satisfied with the redactions made to the information he was supplied with under regulation 10(5)(a). He argued that:
 - (i) all of the information had previously been made available online;
 - (ii) the redacted information was available to view either on Google satellite or by physically viewing the buildings in situ, and
 - (iii) there were instances where the buildings were never built or subsequently demolished.
22. Mr P was also dissatisfied with the time taken by the Council to respond to his request.
23. Mr P raised specific dissatisfaction that information was redacted from a planning application not related to the nuclear facility and also regarding the redaction of what appeared to him to be the name of a structure. On receipt of his application, the Council reviewed these specific instances and disclosed this information to the applicant.

Regulation 10(5)(a)

24. The Council withheld detailed site plans, elevations and details of buildings or structures on the basis that regulation 10(5)(a) applied.
25. Under 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)). An authority applying this exception must be able to demonstrate that there is a real risk or likelihood that actual harm would follow disclosure at some point in the near (certainly foreseeable) future, not simply that the harm is a remote or hypothetical possibility.
26. The Council stated that the information requested related to various historical applications for planning permissions between the years of 1994 and 2001 for the nuclear power station at Hunterston. It explained that some of the plans supplied contained further detail than would be required for planning permission: the same plans were likely used for building warrant applications, providing detail on internal structure for the building for which planning permission was sought
27. The Council took into consideration the nature of the information, alongside the current threat level to conclude that the exception applied. The Council argued that disclosure of the requested information would make it accessible to those who would seek to use that information for nefarious purposes. The Council highlighted that the MI5 security service regularly reviews the current threat from international terrorism in the UK and, since September 2017, the threat has been classified as severe, indicating that an attack is highly likely.
28. The nature of the information, along with the current threat level, led the Council to conclude that disclosure of the redacted information would be likely to prejudice substantially national

security and, as a result, public safety. Any terrorist activity affecting the nuclear facility would have a considerable detrimental impact on a large number of people residing in the vicinity of the facility.

Previously available

29. The Council accepted that the information requested would have been available to view at public offices when the planning applications were under consideration. The Council also acknowledged that more recent planning applications would have been published online. However, the Council submitted that the fact that the information was made available at some point in the past was not, in its opinion, a relevant factor. The Council argued that only the circumstances at the time of the information request could be taken into account when determining if the exception applied. This was of particular relevance to the Council, with regard to the terrorist threat level at the time of the request.
30. Mr P argued that the information redacted could be viewed on Google Earth or physically viewed from the boundaries of the site. The Council considered these arguments, but remained of the view that the exception applied. The Council explained that, as far as possible, images within the planning applications were disclosed if they did not give rise to national security considerations. While the Council accepted that some information might be available to view using applications such as Goggle Earth, the technical specifications outlined in the plans add a level of detail and related security risk not present in a photo. Likewise, the Council stated that a building seen in part from a public right of way did not provide the same level of detail as the plans attached to the planning applications.
31. Mr P was also dissatisfied with the redaction of information from planning applications which, he stated, related to buildings that were never built or had since been demolished. The Council submitted that no permission was required to demolish these buildings and there was no obligation, at that time, for a developer to inform the Council when building works commenced. Consequently, the Council stated that it was unable to determine whether these buildings were ever built or whether the buildings had since been demolished. The Council also concluded that these matters were irrelevant to its decision to redact information, submitting that information related to how nuclear power stations buildings are designed was still information it considered appropriate to be covered by this exception.
32. The Council submitted that, in all the circumstances, a planning application pertaining to a nuclear facility could not be considered in the same way as a typical planning application and, whilst certain information could be – and had been – disclosed, an exception was rightfully maintained in respect of the most sensitive material.

The Commissioner's view

33. The Commissioner has carefully considered the submissions made by the Council and Mr P, along with the extent to which information is, or was, already publicly available. The Commissioner must take into the consideration all of the circumstances at the time of the information request (or, where relevant, at review stage). The application of an exception may change with the passage of time. With this in mind, the Commissioner is not bound to order the release of information previously made available; the circumstances surrounding each request must be taken into consideration.
34. The Commissioner acknowledges that some information is accessible to the public using applications such as Google Earth and from surveillance from the boundaries of the site, but having reviewed the information, information from these sources does not equate to the same detail as redacted from the information in question. Although, as the Council accepts,

this information was previously available to view, such arguments do not, in the Commissioner's view, automatically undermine the engagement of the exception.

35. The Commissioner notes that MI5's published threat level at the time of this request was severe, as it remains, meaning an attack is highly likely¹. The information redacted relates to detailed structural plans, elevations or site plans. The Commissioner accepts that disclosure of these details, in the current context, would provide an opportunity for exploitation by those with malevolent intent, with a resulting substantial danger to immediate residents and beyond. Given the current threat level, the Commissioner cannot consider this risk to national security and public safety to be unduly remote. The Commissioner is therefore satisfied that the exception applies.

The public interest test

36. Having accepted 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.
37. When considering the public interest arguments, the Council stated that it had regard to the fact that the information was previously made available when the planning applications were "live". It also considered the environmental damage that would result if the information was to be exploited by those who would seek to cause harm in furthering their own purposes.
38. In balancing the public interest, the Council referred to the Commissioner's guidance², which states that the circumstances at the time of the information request must be taken into account and that the balance may change over time. The Council considered this particularly relevant and referred to the change in terrorist threat level. The Council acknowledged that where the terrorist threat level was low or moderate, the public interest in disclosing the information might have outweighed that of maintaining the exception.
39. The Council submitted that the arguments on the public interest were not evenly balanced and concluded that the arguments in favour of maintaining the exception were stronger.
40. The Commissioner recognises that there is a significant public interest in disclosure of the redacted information, in order to allow interested parties to be able to understand more fully the local risks, given the potential consequences for the safety of local residents. The Commissioner also recognises the wider public interest in transparency of the planning process. However, it is the Commissioner's view that to some extent the public interest is met by the information already made available as a result of Mr P's request (and by information being available at the time the relevant applications were under consideration).
41. The Commissioner also recognises that there is a significant public interest in ensuring the safety of this site is not compromised by disclosure of information which could be used by those with malevolent intent, thus endangering local residents and the wider environment. Having balanced both arguments, the Commissioner concludes that the public interest in maintaining the exception is more compelling and that the exception at regulation 10(5)(a) should apply to withhold the information.

¹ <https://www.mi5.gov.uk/cy/threat-levels>

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/ThePublicInterestTestEIRs.aspx>

42. However, the Commissioner must also find that the Council was not entitled to apply regulation 10(5)(a) of the EIRs to the information originally withheld but disclosed to Mr P after he applied to the Commissioner.

Handling of request

43. Regulation 5(2)(a) of the EIRs gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications, including the provisions of regulation 7.
44. The Council wrote to Mr P on 7 February 2018, seeking an extension under regulation 7(1) in response to his information request made on 6 December 2017. Regulation 7(1) allows a Scottish public authority to extend the timescales for response by up to 20 working days, where the volume and complexity of the information requested make it impracticable to comply sooner or to reach a decision to refuse to comply. Regulation 7(2) states that requesters should be notified of this “as soon as possible” and in any event no later than 20 working days after receipt of the information request. Given the timing of its request for an extension, the Council failed to comply with regulation 7(2) and therefore was not entitled to extend the timescale. The Council acknowledged this failure during the investigation.
45. It is a matter of fact that the Council did not provide a response to Mr P’s request for information within 20 working days, so the Commissioner finds that it failed to comply with regulation 5(2)(a) of the EIRs.
46. The Council accepted that there were procedural irregularities in dealing with Mr P’s request and requirement for review. The Council accepted that the request was not progressed as quickly and as efficiently as it ought to have been and apologised for this failure and any inconvenience caused.

Decision

The Commissioner finds that North Ayrshire Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr P.

The Commissioner finds that by applying regulation 10(5)(a) to information which remained withheld by the end of the Commissioner’s investigation, the Council complied with the EIRs.

However, the Commissioner also finds that the Council was not entitled to apply regulation 10(5)(a) to the remaining information withheld in response to Mr P’s request, provided to Mr P after he applied to the Commissioner.

The Commissioner also finds that the Council failed to comply with the timescale in regulation 5(2)(a) of the EIRs when responding to the request.

Given that information was provided to Mr P during the investigation, the Commissioner does not require the Council to take any action in respect of these failures, in response to Mr P’s application.

Appeal

Should either Mr P 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.

Margaret Keyse
Head of Enforcement

22 May 2019

The Environmental Information (Scotland) Regulations 2004

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)-
 - (a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and
 - (b) is subject to regulations 6 to 12.

...

7 Extension of time

- (1) The period of 20 working days referred to in-
 - (a) regulation 5(2)(a);
 - (b) regulation 6(2)(a); and
 - (c) regulation 13(a),may be extended by a Scottish public authority by a further period of up to 20 working days if the volume and complexity of the information requested makes it impracticable for the authority either to comply with the request within the earlier period or to make a decision to refuse to do so.
- (2) Where paragraph (1) applies the Scottish public authority shall notify the applicant accordingly as soon as possible and in any event no later than 20 working days after the date of receipt of the request for the information.

...

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-
- (a) international relations, defence, national security or public safety;

...

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