



Freedom of Information

What Wind farm Developers need to be aware of

On 1st January 2005 The Freedom of Information (Scotland) Act 2002 and The Freedom of Information Act 2000 came into force in the UK. The two Acts between them contain the regime relating to the right to access recorded information held either by a public authority in Scotland or by a UK public authority operating in Scotland.

Who do the Freedom of Information Acts apply to?

A public authority is defined as an organisation exercising functions of a public nature or providing a public service under a contract with a public authority. It would therefore not apply directly to private sector organisations such as a wind farm developer. It does however apply to the Scottish Executive, the Police, NHS, the Scottish Parliament and all Scottish Local Authorities together with Scottish Natural Heritage and Highlands and Islands Enterprise. If information or communications relating to a wind farm developer are held by any of these public authorities an application for information directed to a public authority may indirectly result in its release.

Who can apply to access information?

An applicant does not have to be an individual; a company can make a request, as can other types of organisations such as charities, pressure groups, political parties and other public authorities. Applicants do not have to be based in Scotland; anyone, anywhere can make a request. The applicant does not have to give a reason why they require the information.

What information can be accessed?

The Act extends to all recorded information held by or on behalf of a public authority subject to a number of exemptions. Information held by a public authority extends only to information which is actually recorded, although the manner in which it is recorded does not matter. Information held by a public authority on behalf of another person who is not a public authority cannot be accessed. The access right extends to information recorded both before and after 1st January 2005.

What information cannot be accessed?

There are circumstances in which a public authority may refuse a request for information. These exemptions to the general right of access to information are either:

- **Absolute** - the public authority does not have to disclose the information. Some examples of absolute exemptions are: the information is accessible by other means; the information is prohibited from disclosure by other legislation; the information is confidential and obtained from a third party; or
- **Qualified** - the public authority has to apply two tests before applying the exemption and refusing the request. First, the substantial prejudice test - will disclosure substantially prejudice a particular interest? Second, the public interest test - is the public interest in disclosing the information outweighed by the public interest in withholding the information?

Which exemptions to the right of access may be relevant to a wind farm developer?

- **Commercial Interests:** information held by a public authority that is (1) a trade secret and therefore protected as essential to an enterprise (public interest test is applied); or (2) likely to prejudice the commercial interest of any person (public interest and substantial prejudice tests are applied). Information relating to a planning application could well be within this category. The work undertaken by the developer may be commercially sensitive. Much of that information may constitute a trade secret and will be exempt subject to the public interest test. Where the information is not strictly speaking a trade secret, it is likely to be information generated as a result of a significant expenditure of time, money, and resources by the developer and so it is very likely that the release of that information would prejudice their commercial interests. Consequently the greater the prejudice to the developer, the more difficult it will be to demonstrate that it is in the public interest that the information be released.

- *Confidentiality of Communications*: for this exemption to apply (1) the information must have the necessary quality of confidence *i.e.* the information must not be common knowledge, (such as something that appears on the developer's website); (2) the information was provided to the public authority in circumstances imposing an obligation on the authority to maintain confidence e.g. with an express statement that it be kept confidential; and (3) the information has been disclosed without the authority of the person providing the information to the public authority. Developers should consider whether information given by it to an authority is clearly given in confidence, and whether its disclosure by the authority without consent would be detrimental to the developer. Communications between a public authority and their solicitors are confidential, subject to the public interest test. Information relating to a pending judicial review could therefore be exempt.
- *Court Records*: this exemption is not subject to the public interest test. It is up to a court to decide whether to allow access to information lodged with the court for the proceedings. Again, this may apply to judicial review proceedings.
- *Vexatious or repeated requests*: the public authority does not have to comply with a request for information where such a request is vexatious or "manifestly unreasonable". Although it is very difficult to prove someone's motive in making a request, if that person, either individually or through a campaign or pressure group, has previously indicated that their intention is to cause the public authority maximum inconvenience, the request will usually be regarded as vexatious.

What about Environmental Information?

Environmental Information can now also be publicly accessed under The Environmental Information (Scotland) Regulations 2004. These also came into force on 1st January 2005. Information can be accessed about: (a) the state of the environmental elements, including soil, land, biological diversity, landscape and natural sites; (b) factors such as energy, noise, radiation or waste affecting or likely to affect the environment; (c) measures such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect or protect the environmental elements.

Exemptions? There are no absolute exemptions to the disclosure of Environmental Information. The public interest test must be applied in each case. The exemptions are broadly similar to those under the Acts, but are not as wide, and include the protection of commercial confidentiality and Intellectual Property rights.

Points to note.

1. *Confidentiality of Communications* - ensure that submissions to a public authority are made on the basis that the information is not to be released, if to do so would prejudice your operations.
2. *E-mail and letter caveats* - ensure that these state that information provided to a public authority is considered to be given in confidence and is not to be disclosed without your consent.
3. Remember, the right of access is also available to you.

If you require advice on a specific point please contact :-

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