



Scottish Information
Commissioner
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Decision Notice 266/2024

The obligation to government legislation

Authority: Scottish Ministers

Case Ref: 202401024

Summary

The Applicant asked the Authority a constitutional question on the obligation to government. The Authority responded that it did not hold information falling within scope of the request but, by way of advice and assistance, it provided other information that it considered might be useful to the Applicant. The Commissioner investigated and was satisfied that the Authority's response complied with the EIRs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of "the Act", "applicant" and "the Commissioner") (Interpretation); 5(1) (Duty to make environmental information available on request); 9(1) (Duty to provide advice and assistance); 10(1) and (4)(a) (Exceptions from duty to make environmental information available); 17(1), (2)(a) and (b) (Enforcement and appeal provisions)

Background

1. On 22 April 2024, whilst commenting on an article he had read about the Scottish Kept Bird Register, the Applicant made a request for information to the Authority. He asked;

- (i) Please provide the name of the man or woman (or men or women) with the right to dictate rules that others must follow, along with details of how this right was lawfully established (otherwise by definition it would not be lawful) at root source;
- (ii) Or, failing that, please provide details of how an obligation to government legislation is lawfully created (otherwise by definition that obligation would not be lawful) at root source

The Applicant further emphasised that he sought the root source of this information rather than links to how law is created in Scotland. He added that that he only sought root source, tangible and documented evidence, and no typed opinions.

2. The Authority responded on 8 May 2024. It provided web links to the hierarchy of legislation which gave the Ministers the Authority to bring forth legislative measures for a Scottish Kept Bird Register. The Authority cited regulation 6(1)(b) of the EIRs, arguing that it did not have to disclose information which was already publicly available and easily accessible.
3. On 13 May 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he did not consider that the Authority had properly understood his request, and it had asked the wrong department to provide its response.
4. The Authority notified the Applicant of the outcome of its review on the 10 June 2024. The review concluded that the original decision should be confirmed without modification and the Authority explained that responses to EIR requests were issued on behalf of the Authority and it was for the Authority to determine which department was best placed to provide a response. The Authority explained that it did not hold information relating to other aspects of the request (seeking legal advice and why and how legislation applies) and it applied regulation 10(4)(a) of the EIRs.
5. On 31 July 2024, the Applicant wrote to the Commissioner, applying 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. The Applicant stated he was dissatisfied with the outcome of the Authority's review because it did not answer his question in good faith, nor did he consider the request had been responded to by the correct department. He did not accept that his request had been answered properly.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 21 August 2024, the Authority was notified in writing that the Applicant had made a valid application. 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 Authority was invited to comment on this application and to answer specific questions. These related to how the Authority interpreted the Applicant's request and the searches it had carried out to identify information falling within scope of the request.

Commissioner's analysis and findings

9. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Interpretation of the request

The Applicant's interpretation of the request

10. The Applicant submitted that his request was perfectly clear and it was his view that the Authority did not answer the question in good faith, at all.
11. The Applicant argued that, despite him informing the Authority multiple times that it had asked the wrong department to handle his request, the Authority persisted with its approach, guaranteeing that the question could not be answered properly.
12. He submitted that, although his request was made in relation to the Scottish Kept Bird Register, his request was a constitutional matter rather than a matter for the Directorate of Agriculture and the Rural Economy.

The Authority's interpretation of the request

13. The Authority explained that the Applicant's request was subject to its usual allocation process, and the request was allocated to the policy division that was responsible for the policy that the request related to. In this case, because the request was prompted by the Scottish Kept Bird Register, the policy division concerned was the Animal Health and Welfare Division.
14. The Authority submitted that it had considered the request carefully. Given the nature of the request was about why legislation should be complied with and who makes, or has the right to make laws, the Authority took legal advice on interpreting and handling the request.
15. The Authority submitted that the request ultimately was not about information held by it; rather, in the Authority's view, the request related to information on the fundamental principles of why any legislation is made and who has the power to enforce it. The Authority explained that this was not information that it was required to hold as it has no need for that information in conducting its business. However, the Authority submitted that it carried out searches to investigate whether it did hold information falling within the scope of the request, and it provided the Commissioner with the outcome of those searches. The Authority maintained that it did not hold the information requested by the Applicant.
16. The Authority commented that, in the spirit of being helpful and mindful of its duty under regulation 9(1) of the EIRs to advise and assist, it had provided other information to the Applicant in response to his request.

The Commissioner's view

17. The Commissioner has carefully considered the submissions from both parties. The Commissioner acknowledges the Applicant's concerns about the department tasked with providing the response. However, the Commissioner agrees with the Authority that any response to a request or to a requirement for review is given on behalf of Authority and is not given from any individual department.

18. The Commissioner has studied the wording of the Applicant's request. He observes that the request contained comments about (and a link to) an article he had read about the Scottish Kept Bird Register. Specifically, the request was prefaced by the sentence,

"I promise, therefore, that I will indeed register my flock of chickens as stipulated, but ONLY if you can provide the following information under the Freedom of Information (Scotland) Act 2002 (without which there would be no obligation for me to do so)"

The Applicant's concluding remarks were

"Otherwise, there is in reality no such obligation to register my chickens... nor, for that matter, anything else the government comes out with."

In these circumstances, the Commissioner accepts that the Authority took a reasonable interpretation of the request and allocated the request appropriately.

19. The Commissioner is also satisfied that the Authority considered its duties under regulation 9(1) of the EIRs by way of providing advice and assistance to the Applicant in the form of other information that the Authority thought might be useful to the Applicant, given his comments.

Handling in terms of the EIRs

20. The Authority processed and responded to the Applicant's request and requirement for review under the EIRs.
21. Where information falls within the scope of the definition of "environmental information" in regulation 2(1) of the EIRs, a person has a right to access it (and the public authority a corresponding obligation to respond) under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
22. Although the Applicant challenged the Authority's interpretation of his request, he did not challenge the Authority's decision to deal with the information as environmental information. The Commissioner is satisfied that the information does comprise environmental information (see in particular paragraphs (a) and (c) of the definition in regulation 2(1) of the EIRs) and will consider the handling of the request in what follows solely in terms of the EIRs.

Regulation 10(4)(a) – Information not held

23. On receipt of a request for environmental information, 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 make the information available, unless a qualification in regulation 6 to 12 applies (regulation 5(2)(b)).
24. Under the EIRs, a Scottish public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.
25. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make information available to the extent that it does not hold the information when it received the request.
26. In its submissions to the Commissioner, the Authority confirmed that it did not hold information falling within scope of the Applicant's request and it maintained its reliance on regulation 10(4)(a).

27. The Authority explained that it had carried out two global searches of its corporate records management system (eRDM) using the search terms “right to make law” OR “right to make legislation”; and “lawful creation” OR “obligation to obey government legislation”. Given the terms of the request, the Authority argued that these were the appropriate keywords and phrases to search for any relevant information held.
28. The Authority submitted that these searches generated a total of 44 results, and that each result was individually reviewed. The Authority submitted that nothing of relevance was returned by the searches other than correspondence generated by the request, and that none of the results were in scope of the Applicant’s information request.
29. Given the terms of the request, the Commissioner is satisfied that the searches carried out by the Authority were appropriate and, on balance, should have been able to identify information within scope of the request if it existed, and was held.
30. In all the circumstance of the case, the Commissioner is satisfied that the Authority does not hold recorded information which would fulfil the Applicant’s request. The Authority was therefore entitled to rely on the exception in regulation 10(4)(a) of the EIRs, on the basis that it did not hold the information requested.

The public interest

31. The exception in regulation 10(4)(a) of the EIRs is subject to the public interest test in regulation 10(1)(b) and so can only apply if, in all the circumstances of the case, the public interest in maintaining the exception outweighs that in making the information available. The question of whether or not a public authority holds information is a factual one, determined on the balance of probabilities. If a public authority does not hold the information, then there is no meaningful public interest test that can be undertaken.
32. In this case, for the reasons set out above, the Commissioner is satisfied that the Authority does not hold any information covered by the request, and did not do so, on receipt of the request. Consequently, he accepts that there is no conceivable public interest in requiring the disclosure of such information and finds that the public interest in making information available is outweighed by that in maintaining the exception.

Decision

The Commissioner finds that the Authority complied the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or the Authority 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.

Jennifer Ross
Deputy Head of Enforcement

21 November 2024