

Decision Notice



Decision 008/2010 Ms Jean Camidge and the City of Edinburgh Council

Building warrant plans

Reference No: 200900647

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Summary

Ms Camidge requested from the City of Edinburgh Council (the Council) a copy of building warrant plans for a specific property. The Council responded by relying on the exception in regulation 10(5)(f) of the Environmental Information (Scotland) Regulations 2004 (the EIRs) for withholding the building warrant plans. Following a review, Ms Camidge remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council failed to deal with Ms Camidge's request for information in accordance with the EIRs. Considering the position at the time of the Council's review of Ms Camidge's request, the Commissioner could not accept the Council's submissions on the availability of the information in terms of regulation 6 of the EIRs. However, given that changes in legislation had since resulted in the information becoming accessible to the public, the Commissioner did not require the Council to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment).

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definition of environmental information); 5(1) and (2)(b) (Duty to make environmental information available on request); 6(1)(a) and (b) (Form and format of information).

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

The Building (Procedure) (Scotland) Regulations 2004 (SSI 2004/428), as amended.

Background

1. On 13 December 2008, following previous correspondence in relation to statutory approvals for building works at a specified property, Ms Camidge wrote to the Council to request the following information:



On the understanding that you fully agree with the following meaning of Building Warrant and Full Planning Permission [provided] please will you provide FOI with regard to Warrant 06/00448/DEMERE and the appropriate Full Planning Application which has been approved in association to/with this Warrant 06/00448/DEMERE.

2. The Council acknowledged Ms Camidge's request on 15 December 2008. She received no further response, however, and contacted the Council on 23 January 2009 to request a review of its failure to respond to her information request.
3. The Council responded on 2 March 2009. In relation to the planning application the Council relied on regulation 6(1)(b) of the EIRs (on the basis that the information was already publicly available and accessible to her) and directed Ms Camidge to its Planning and Building Standards portal, where it considered she could view all the material relating to planning applications for the specific address she was interested in. In relation to the Building Warrant plans Ms Camidge had requested, the Council explained that it was relying on regulation 10(5)(f) of the EIRs in withholding this information from her.
4. On 31 March 2009, Ms Camidge wrote to the Commissioner, stating that she was dissatisfied with the outcome of the Council's review and applying 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 certain specified modifications. It was clear from the terms of the application that it related to that part of her information request in respect of building warrant plans only. This was confirmed as the investigating officer's understanding of the position in subsequent correspondence with Ms Camidge: the Commissioner, having considered the relevant correspondence and noted concerns expressed by Ms Camidge, accepts this position (the interpretation of which will be considered further in paragraph 14 below).
5. The application was validated by establishing that Ms Camidge had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

6. On 29 April 2009, the Council was notified in writing that an application had been received from Ms Camidge and asked to provide the Commissioner with any information withheld from her. The Council responded with the information requested and the case was then allocated to an investigating officer.
7. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on the exception in regulation 10(5)(f) of the EIRs to the withheld information.



8. A full response was received from the Council. Within its response, the Council explained that due to an amendment made to regulation 58 of the Building (Procedure) (Scotland) Regulations 2004 by the Building (Procedure) (Scotland) Amendment Regulations 2009, which had come into effect on 1 May 2009, Ms Camidge would now be entitled to inspect (but not receive copies of) the building warrant plans which had previously been withheld from her.
9. The investigating officer notified Ms Camidge of this change to her rights under the legislation and passed on the details of the relevant officer within the Council whom she could contact to arrange to inspect the plans. Ms Camidge explained that this was not an acceptable solution for her and that she still required a decision from the Commissioner on this matter.
10. In further correspondence, the investigating officer also made enquiries (which the Council responded to) as to what information the Council held which fell within the scope of Ms Camidge's request.
11. During the course of the investigation, the Council explained that it was no longer seeking to rely on the exception in regulation 10(5)(f) of the EIRs for the building warrant plans, but instead wished to rely on the provisions of regulations 6(1)(a) and (1)(b) of the EIRs.
12. The submissions provided by both the Council and Ms Camidge will be fully considered in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Ms Camidge and the Council and is satisfied that no matter of relevance has been overlooked.

Role of Commissioner and scope of application

14. The Commissioner should emphasise at the outset that his role in this decision is to consider whether the Council dealt with Ms Camidge's request for information in accordance with Part 1 of FOISA and the requirements of the EIRs, specifically in the respects identified by the applicant in her application (see paragraph 4 above). It is not the Commissioner's function to determine whether the Council discharged any obligations it may have owed to the applicant (in particular) under other legislation, such as the Building (Procedure) (Scotland) Regulations 2004, although he may require to consider the application of other legislation insofar as this impinges directly on the application of any relevant provisions of FOISA or the EIRs.
15. It is the role of the Commissioner to consider the public authority's application of any relevant provisions of FOISA or the EIRs to the requested information at the time it dealt with the applicant's request and request for a review.



16. As indicated in paragraph 4, the Commissioner is of the view that Ms Camidge's application to him concerns only that part of her information request relating to building warrant plans. Even if that were, as Ms Camidge has suggested it should be, interpreted as embracing information in addition to that contained in drawings submitted to the Council in connection with the building warrant application, he is satisfied from the Council's submissions that it holds no information in respect of the application for Building Warrant 06/00448/DEMER in addition to the drawings copied to him for the purposes of this investigation. From his understanding of the building warrant process, as explained by the Council, he would not expect any further information to be held. Having considered the terms of her information request, request for review and application to him, he can see no basis for interpreting the application as extending to matters not relating to that building warrant application, for example an application for planning permission in respect of the works in question.

Section 39(2) of FOISA

17. The Commissioner has set out his thinking on the relationship between FOISA and the EIRs in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*. Broadly, the Commissioner's general position on the interaction between the two regimes is as follows:
- The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition in regulation 2(1) of the EIRs.
 - There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
 - Any request for environmental information therefore **must** be dealt with under the EIRs.
 - In responding to any request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
 - If the authority does not choose to claim the section 39(2) exemption, it must deal with the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these).
 - The Commissioner is entitled (and indeed obliged), where he considers a request for environmental information has not been dealt with under the EIRs, to consider how it should have been dealt with under that regime.
18. During the course of the investigation, the Council submitted that it was relying on section 39(2) of FOISA in seeking to withhold the building warrant plans from Ms Camidge under the EIRs.
19. The Council explained that this request was handled under the EIRs as planning applications and enforcement measures relate to the built and natural environments and to measures (including administrative measures) such as legislation, policies and plans. This request was therefore considered to relate to environmental information as the Council considered that it came within the definition under regulations 2(1)(c) and 2(1)(f) of the EIRs.



20. Given the subject matter of the information requested by Ms Camidge (building warrant plans for significant external alterations to a residential property), the Commissioner has no difficulty in agreeing with the position arrived at by the Council, i.e. that the withheld information is environmental information for the purposes of the EIRs. The request relates to the state of built structures (paragraph (f) of the definition), as they may be affected by measures, including plans and activities, likely to affect the land and landscape (paragraph (c) of the definition).
21. The Commissioner is therefore satisfied that the information requested is exempt under section 39(2) of FOISA, in that it relates to environmental information falling within the scope of the EIRs. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner's view is that in this case, as there is a separate statutory right of access to environmental information available to Ms Camidge, the public interest in maintaining this exemption and dealing with Ms Camidge's request in line with the requirements of the EIRs outweighs any public interest in disclosure of information under FOISA. Consequently, it would have been correct in this case to apply section 39(2) and thereafter deal with the request under the EIRs.

Regulation 6(1)(a) of the EIRs

22. Regulation 6(1)(a) of the EIRs provides that where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless it is reasonable for it to make the information available in another form or format.
23. In its submissions, the Council has advised that under a recent amendment (SI No. 117 2009) to the Building (Procedure) (Scotland) Regulations 2004, Ms Camidge is now entitled to inspect the Building Warrant Plans for the site in question, but not to receive a copy of them. The Council has also explained that as it has made what it considers to be a reasonable offer to Ms Camidge to take the information to her, it believes that (by virtue of regulation 6(1)(a) of the EIRs) it is not therefore obliged to make the information available to her in the form she has requested .
24. The Council has further advised that it is not denying Ms Camidge access to the requested information, but equally considers it inappropriate to provide copies of the information in disregard of the stated legislation.



25. While the Commissioner notes the amendment which was made to the Building (Procedure) (Scotland) Regulations 2004, he must also note that this amendment did not come into effect until 1 May 2009, which was some time after Ms Camidge submitted her request (13 December 2008) and her request for a review (23 January 2009), and also some time after the Council responded to the latter on 2 March 2009. The Commissioner does recognise that the Council made an offer to Ms Camidge to bring the plans to a location of her choice for her to inspect them, but again this only occurred after the amendment to the legislation came into force on 1 May 2009. For these reasons, and given that at the time it dealt with Ms Camidge's request and request for a review the Council had asserted that she was not entitled to access or receive a copy of the building warrant plans for the site in question (due to the version of the Building (Procedure) (Scotland) Regulations 2004 in force at that time), the Commissioner cannot uphold the Council's reliance on regulation 6(1)(a) of the EIRs in respect of this information.

Regulation 6(1)(b) of the EIRs

26. Regulation 6(1)(b) of the EIRs states that where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless the information is already publicly available and easily accessible to the applicant in another form or format.
27. The Council has advised that as it has made the information available to Ms Camidge at the Council location at which it is held, it therefore considers regulation 6(1)(b) of the EIRs to apply. The Council points out that while Ms Camidge clearly wants the information presented in a particular form, the information is publicly available in another form.
28. Although the Commissioner accepts that the Council has extended this offer to Ms Camidge to allow her to view the building warrant plans for the site in question at the appropriate Council offices (or for that matter at another location of her choosing), this offer was only extended after the amendment detailed above was made to the Building (Procedure) (Scotland) Regulations 2004. The offer was made as a result of the amendment coming into force on 1 May 2009. For broadly the same reasons as he has refused to uphold the Council's reliance on regulation 6(1)(a) of the EIRs, the Commissioner cannot uphold its reliance on regulation 6(1)(b): the amendment to the relevant legislation (and the consequent offer to make the information available) did not occur until after it had dealt with Ms Camidge's request and request for review.
29. As the Commissioner is not satisfied that regulation 6(1)(b) of the EIRs would be applicable to the Building Warrant Plans in question, he is not required to go on to consider the application of the public interest test under regulation 10(1) of the EIRs.



Steps required for compliance with the EIRs

30. The Commissioner is now required to consider, in accordance with section 49(6)(b) of FOISA, what steps the Council must take to comply with regulation 5(1) of the EIRs. This aspect of his decision must be determined in the light of the circumstances prevailing now rather than at the time the Council dealt with Ms Camidge's request.
31. In reaching a decision as to the steps the Council is required to take, the Commissioner has taken into account the Council's obligation, since 1 May 2009, to make the withheld information available for inspection by the public at all reasonable hours (while affording to specified categories of person only the right to make copies)¹. In the circumstances, he is satisfied that the information is now publicly available and easily accessible to the applicant (Ms Camidge), albeit not in the form she has requested. While noting Ms Camidge's wish to receive copies of the information, the Commissioner has been provided with no submissions which would lead him to consider it unreasonable to conclude that the information is easily accessible to her in the form in which it is available. He also notes the Council's offer take the information to be inspected at a location of Ms Camidge's own choosing.
32. Having considered what is now available to the public and easily accessible to the applicant, the Commissioner is of the view that the provisions of regulation 6(1)(b) of the EIRs, while clearly inapplicable at the time Ms Camidge's request and request for review were dealt with by the Council, would be applicable were the Council to be dealing with them now. In the circumstances of this case, therefore, the Commissioner is satisfied that no action is now required from the Council to comply with regulation 5(1) of the EIRs.

DECISION

The Commissioner finds that the City of Edinburgh Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Ms Camidge. In particular, the Commissioner finds that the Council was not justified in relying on the provisions of regulation 6(1)(a) and (b) in relation to the withheld information and thereby failed to comply with regulation 5(1).

In the circumstances, given that the withheld information is now available to the public and easily accessible to the applicant, the Commissioner does not require the Council to take any action in response to this failure.

¹ The Building (Procedure) (Scotland) Regulations 2004 (SSI 2004/428), as amended



Appeal

Should either Ms Camidge or the City of Edinburgh Council wish to appeal against this decision, there is an 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 notice.

Kevin Dunion
Scottish Information Commissioner
21 January 2010



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.

...



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;

...

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

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

...



6 Form and format of information

- (1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-
 - (a) it is reasonable for it to make the information available in another form or format;
or
 - (b) the information is already publicly available and easily accessible to the applicant in another form or format.