

Decision Notice



Decision 009/2012 Mr Walter Zayachkivsky and City of Edinburgh Council

Information relating to a Statutory Notice repair

Reference No: 201200111

Decision Date: 23 January 2013

www.itspublicknowledge.info

Rosemary Agnew

Scottish Information Commissioner

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Summary

Mr Zayachkivsky asked the City of Edinburgh Council (the Council) for information regarding repairs undertaken in response to a statutory notice. The Council failed to respond to this request within 20 working days and Mr Zayachkivsky requested a review. The Council responded by withholding some of the requested information on the basis that disclosure would undermine ongoing investigations into the handling of statutory repair notices and advised that it did not hold the rest of the information.

During the investigation, the Council disclosed some of the withheld information to Mr Zayachkivsky and also identified and disclosed further information falling within the scope of his request. The Commissioner finds that the Council correctly notified Mr Zayachkivsky that it did not hold some of the information he asked for. However, in failing to identify and disclose the remaining information covered by Mr Zayachkivsky's request, the Council failed to comply with regulation 5(1) of the EIRs.

The Commissioner also expressed concern at the delay caused to her investigation (and to Mr Zayachkivsky) by the actions of the Council during the investigation.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(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) (definitions (a) and (c) of "environmental information"); 5(1) and (2)(a) and (b) (Duty to make available environmental information on request); 10(1), (2), (4)(a) and (5)(b) (Exceptions from duty to make environmental information available); 16(1) and (4) (Review by Scottish public authority)

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.

Background

1. On 13 October 2011, Mr Zayachkivsky wrote to the Council requesting the following information regarding statutory notices issued to a specified address:
 - (a) Tender report for the project.
 - (b) Original tender document by Capita Symonds (single entity to cover all works 10-26).
 - (c) Final account document by Capita Symonds (single entity to cover all works 10-26).



- (d) Full specifications of new stone, third party specialist testing of defective stone and stone schedules for all replacement and repaired stonework.
 - (e) Photographic evidence pertaining to defective elements uncovered prior to demolition.
 - (f) Full specification for specialist built-up roofing and 20 year standard guarantee by contractor.
2. The Council acknowledged this email on 14 October 2011, but no response was provided to the requests for information.
 3. On 14 November 2011, Mr Zayachkivsky wrote to the Council requesting a review of its failure to respond to his request.
 4. The Council notified Mr Zayachkivsky of the outcome of its review on 14 December 2011. In its response, the Council notified Mr Zayachkivsky that it considered the information he asked for in requests c) and e) to be excepted from disclosure in terms of regulation 10(5)(b) of the EIRs. The Council also advised Mr Zayachkivsky that it was still trying to locate information falling within the scope of requests a), b), d) and f), and that it would aim to respond to him by 20 December 2012 regarding these outstanding requests.
 5. The Council did not contact Mr Zayachkivsky regarding the completion of its review until 13 February 2012 (by which time Mr Zayachkivsky had, as he was entitled to do, made an application to the Commissioner). In this letter, it confirmed its previous decision that information falling within the scope of requests c) and e) was excepted from disclosure in terms of regulation 10(5)(b) of the EIRs. The Council stated that it did not hold any information falling under the scope of requests a), b), d) and f), and accordingly regulation 10(4)(a) applied to these requests; however, the Council noted that due to an ongoing investigation the reviewers might not have had full access to all relevant documents.
 6. On 12 January 2012, Mr Zayachkivsky wrote to the Commissioner, stating that he 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.
 7. The application was validated by establishing that Mr Zayachkivsky 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

8. On 19 January 2012, the Council was notified in writing that an application had been received from Mr Zayachkivsky and was asked to provide the Commissioner with any information withheld from him.
9. Despite repeated requests, the Council did not provide the information requested until 13 June 2012. Once the withheld information was received, the case was then allocated to an investigating officer.
10. 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. The Council was asked to justify its reliance on any provisions of the EIRs it considered applicable to the information requested. The investigating officer also noted that while (in its review outcome dated 13 February 2012) the Council had advised Mr Zayachkivsky that it did not hold any information regarding requests a), b), d) and f), the information it later provided to the Commissioner's office on 13 June 2012 seemed to indicate that the Council did hold some information falling within the scope of these requests. The Council was asked if it was willing to disclose all the withheld information to Mr Zayachkivsky.
11. On 5 July 2012, the Council advised the investigating officer that it had disclosed all of the withheld information to Mr Zayachkivsky with the exception of some personal data, withheld in terms of regulation 11(2) of the EIRs.
12. On 31 July 2012, Mr Zayachkivsky confirmed to the investigating officer that he had not received any information from the Council. In light of this, the investigating officer contacted the Council and, later that day, the Council re-sent the email and attachments it claimed to have previously sent to Mr Zayachkivsky on 5 July 2012.
13. On 21 August 2012, Mr Zayachkivsky advised the investigating officer that, having had time to review the information disclosed to him by the Council, he remained dissatisfied and did not consider that the Council had met the terms of his request. Primarily, he considered it likely that the Council held more information falling within the scope of his request than had been disclosed to him.
14. In response to this, the investigating officer raised Mr Zayachkivsky's points of dissatisfaction with the Council and asked it to provide details of the searches that were undertaken to locate information of relevance to Mr Zayachkivsky's request. The Council responded to these queries and a summary of its responses was provided to Mr Zayachkivsky, who raised additional points of dissatisfaction. The investigating officer contacted the Council on a further two occasions, in each case advising it of Mr Zayachkivsky's points of dissatisfaction and asking it to address each of these points. A summary of the Council's responses to these queries was passed on to Mr Zayachkivsky, with the Council's approval. As a result of additional searches conducted by the Council, two photographs falling under the scope of request e) were located and disclosed to Mr Zayachkivsky.



15. The relevant submissions received from both the Council and Mr Zayachkivsky will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

16. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Mr Zayachkivsky and the Council and is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

17. It is clear from the Council's correspondence with both Mr Zayachkivsky and the Commissioner that it considered the information requested was environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns significant external repairs to buildings and the Commissioner is satisfied that it falls within either paragraph (a) or paragraph (c) of the definition of environmental information contained in regulation 2(1) of the EIRs, being information on the state of the elements of the environment, or on measures and activities affecting or likely to affect the state of those elements.

Section 39(2) of FOISA – environmental information

18. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1)) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Council was entitled to apply the exemption to the withheld information, given her conclusion that it is properly classified as environmental information.
19. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exemption and in dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.

Regulation 5(1) of the EIRs

20. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold, but which is not in fact held.



21. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

Adequacy of searches

22. As noted previously, the Council advised Mr Zayachkivsky on 14 December 2011 that it was withholding some of the information he had requested under the exception provided in regulation 10(5)(b) of the EIRs. The Council also advised Mr Zayachkivsky that it was unable, at that time, to provide him with a response regarding the remainder of his requests as the department concerned was still locating the information he had requested.
23. In a further review outcome dated 13 February 2012, the Council confirmed that it was withholding the information covered by requests c) and e) in terms of regulation 10(5)(b) of the EIRs. The Council also advised Mr Zayachkivsky that it now also considered that it did not hold any information falling within the scope of requests a), b), d) and f) and therefore the exception in regulation 10(4)(a) of the EIRs applied to these four requests. However, the Council also stated that, due to an ongoing investigation, it may not have had full access to all documents.
24. During the investigation, the Council withdrew its reliance upon regulation 10(5)(b) of the EIRs (requests c) and e)) and it also withdrew its reliance on regulation 10(4)(a) with regard to requests a) and b) and part 1 of request d). The Council disclosed the information it had been withholding under these exceptions to Mr Zayachkivsky, but maintained that it held no information regarding the second part of request d) and request f). The Council also advised Mr Zayachkivsky that it had redacted personal information from the information it had released to him in terms of regulation 11(2) of the EIRs.
25. Mr Zayachkivsky raised several concerns about the information he had received, explaining why it was not what he had expected to receive in response to his request, and indicating why he believed it was likely that the Council held more information covered by the terms of his request.
26. In its response to the points raised by Mr Zayachkivsky, the Council explained why it did not hold all the information Mr Zayachkivsky expected, and why certain information was not recorded as a matter of routine. With regard to requests b) and c), the Council reiterated that it did not hold any further information relating to these requests, other than that already provided to Mr Zayachkivsky.



27. Mr Zayachkivsky remained dissatisfied with the Council's responses and he maintained that other relevant information regarding his requests must be held by the Council. With regard to request e), Mr Zayachkivsky provided the investigating officer with a photograph he had previously obtained from a Council officer, which was not included on the CD of photographs provided to him by the Council.
28. The investigating officer subsequently contacted the Council and provided it with a copy of the photograph in question. The Council was asked where this photograph was stored and was asked to conduct additional searches in this location to see if any further photographs could be found. The investigating officer also asked the Council further questions about its responses to Mr Zayachkivsky's other requests.
29. In its responses, the Council located one additional photograph of the building but supplied no explanation as to why both photographs had not been retrieved during earlier searches or added to the CD disclosed to Mr Zayachkivsky, nor why the Council had previously maintained it held no additional photographs, when clearly it did.
30. The Council provided further explanation in relation to Mr Zayachkivsky's other queries: these comments were shared with Mr Zayachkivsky during the investigation and are not detailed in this decision.
31. The Commissioner is satisfied that the Council has now identified and disclosed all relevant information to Mr Zayachkivsky. However, the Commissioner is concerned that only part of this information was identified when the Council first responded to Mr Zayachkivsky's request and that additional relevant photographs were not identified by the Council until it received a copy of a photograph it had previously provided to Mr Zayachkivsky in August 2010. In this respect, the initial searches carried out by the Council were clearly inadequate. The Commissioner notes that the Council has provided no explanation as to why these two photographs were not identified earlier. In failing to identify and provide this information at the time of Mr Zayachkivsky's request, the Council failed to comply with regulation 5(1) of the EIRs.
32. Although the Commissioner is now satisfied that the Council has located and disclosed all relevant information to Mr Zayachkivsky, she must decide whether the Council complied with the EIRs in withholding some information under regulations 10(5)(b) and 10(4)(a) when first responding to his request.

Regulation 10(5)(b) of the EIRs

33. Regulation 10(5)(b) of the EIRs 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 course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature.



34. In its response to his request for review, the Council informed Mr Zayachkivsky that it was withholding the requested information because there was an ongoing investigation into the handling of statutory repair notices. In the circumstances, it believed that the release of the information covered by requests c) and e) might prejudice substantially the outcome of such investigations, especially if criminal prosecutions were to arise. The Council considered that the public interest was better served by ensuring that the investigation was not prejudiced by releasing potential evidence into the public domain.
35. As indicated above, during the investigation, the Council disclosed all of the information it had previously withheld under regulation 10(5)(b).
36. At no stage during the investigation did the Council explain to the Commissioner why the information it had previously been withholding under regulation 10(5)(b) of the EIRs was no longer covered by that exception: i.e. whether a change in circumstances meant that the exception no longer applied; whether a change in circumstances had tipped the balance of public interest towards disclosure; or whether the Council had decided that the exception had been wrongly applied in the first place. In the circumstances, the Commissioner can only conclude that the Council was not entitled to withhold the information under regulation 10(5)(b) and, in doing so, failed to comply with regulation 5(1) of FOISA.

Regulation 10(4)(a) of the EIRs

37. Under regulation 10(4)(a) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received.
38. In its review outcome, the Council submitted that it did not hold any information regarding requests a), b), d) and f).
39. As indicated above, during the investigation, the Council found and disclosed to Mr Zayachkivsky all of the information it held regarding requests a) and b) and the first part of request d).
40. At no stage during the investigation did the Council explain to the Commissioner why it had concluded that it held no information falling within the scope of requests a), b) and the first part of request d), or why it had relied upon regulation 10(4)(a) of the EIRs in relation to these requests. During the investigation, the Council simply "found" the requested information and disclosed this to Mr Zayachkivsky. In the circumstances, the Commissioner can only conclude that the Council was not entitled to rely upon the exception in regulation 10(4)(a) in relation to requests a), b) and the second part of request d), and in doing so failed to comply with regulation 5(1) of the EIRs.



41. However, the Commissioner has concluded that the Council was correct to rely upon the exception contained in regulation 10(4)(a) of the EIRs in relation to the second part of request d) and all of request f). The Commissioner has taken account of the searches undertaken by the Council and has accepted its explanations and submissions regarding these requests. The Commissioner has concluded that the Council does not hold any information falling within the scope of these two parts of Mr Zayachkivsky's request, and that in citing regulation 10(4)(a), the Council complied with regulation 5(1) of the EIRs.

Regulation 11(2) - personal data

42. In its letter to Mr Zayachkivsky dated 4 July 2012 (which Mr Zayachkivsky received on 31 July 2012), the Council provided Mr Zayachkivsky with the information it held in relation to his initial request. In this letter, the Council also advised Mr Zayachkivsky that it had redacted personal data from the disclosed information in terms of regulation 11(2) of the EIRs.
43. During the investigation, it became clear that the Council had not redacted any information from the documents disclosed to Mr Zayachkivsky on 31 July 2012; accordingly, its assertion that the exception contained in regulation 11(2) had been relied upon was incorrect. The Council was asked to explain why it had wrongly claimed to have redacted information, but it provided no response other than to confirm that no personal data had been redacted under regulation 11(2) of the EIRs.
44. The Commissioner would remind the Council that it is just as important to ensure that exceptions which have never been applied are not cited as it is to ensure that exceptions which have been applied to withheld information are correctly cited. In this case, the Council's mistake caused an additional and unnecessary delay of several weeks during the investigation.

Timescales for response

45. Regulation 5(2)(a) of the EIRs specifies that the duty to provide information in response to a request should 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 (subject to regulations 6 to 12 of the EIRs).
46. In communication with Mr Zayachkivsky, the Council acknowledged that it had failed to provide him with a response to his request of 13 October 2011 within the required timescale. It advised that this was due to the high volume of requests for information about statutory notices.
47. In his request for review, Mr Zayachkivsky expressed dissatisfaction about the delay in responding to his request and asked that a response be provided as soon as possible.
48. Regulation 16(4) of the EIRs gives authorities a maximum of 20 working days after the date of receipt of the applicant's representations to comply with the requirement for review, subject to exceptions which are not relevant in this case. Other parts of regulation 16, particularly paragraphs (3) and (5), govern the review process and the giving of notice of the outcome to the applicant (see the Appendix below).



49. Mr Zayachkivsky submitted his request for review on 14 November 2011. The Council provided Mr Zayachkivsky with a partial response to his request for review on 14 December 2011, but did not provide him with a complete response to his request for review until 13 February 2012. The Commissioner notes that, even then, the Council acknowledged that due to the ongoing investigation it may not have had access to all relevant documents. Therefore, this “full review” was still, to an extent, the Council’s “interim position” regarding his request and was not complete. This is further demonstrated by the fact that the Council later found and disclosed information falling under requests a), b) and the first part of request d).
50. In the circumstances, the Commissioner finds that the Council breached the timescales set out in regulations 5(2)(a) and 16(4) of the EIRs. While accepting that the Council has been dealing with a high volume of requests for information about repairs required under statutory notices, the Commissioner must emphasise the importance of public authorities prioritising their workloads to ensure compliance with the statutory timescales in answering information requests.
51. The Commissioner must also express concern at the significant delays caused to her investigation (and to Mr Zayachkivsky) as a result of the Council failing to provide her with the information which had been withheld from Mr Zayachkivsky, in failing to provide her with submissions on the exceptions used to withhold information from Mr Zayachkivsky and in advising her that certain information had been withheld when it had not.

DECISION

The Commissioner finds that the City of Edinburgh Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Zayachkivsky.

The Commissioner finds that the Council was entitled to advise Mr Zayachkivsky, in line with the exception in regulation 10(4)(a) of the EIRs, that it did not hold information relating to the second part of request d) and all of request f).

However, by applying the exception in regulation 10(4)(a) of the EIRs to requests a), b) and the first part of request d), and by wrongly applying the exception in regulation 10(5)(b) of the EIRs to requests c) and e), the authority failed to comply with regulation 5(1) of the EIRs.

The Commissioner also finds that the Council breached the timescales set out in regulation 5(2)(a) of the EIRs by failing to respond to Mr Zayachkivsky’s initial request and that it breached the timescales set out in regulation 16(4) of the EIRs by failing to respond to his request for review within 20 working days.

Given that the Commissioner is satisfied that the Council has since provided Mr Zayachkivsky with all of the information it holds in relation to his request for information, the Commissioner does not require the Council to take any action in respect of these failures in response to Mr Zayachkivsky’s application.



Appeal

Should either Mr Zayachkivsky or 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.

Margaret Keyse
Head of Enforcement
23 January 2013



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-

...

- (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 –

...

(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)-

(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.

...

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.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that

- (a) it does not hold that information when an applicant's request is received;

....

- (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-

...

- (b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;

...

16 Review by Scottish public authority

- (1) Subject to paragraph (2), an applicant may make representations to a Scottish public authority if it appears to the applicant that the authority has not complied with any requirement of these Regulations in relation to the applicant's request.

...

- (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.

...