

Decision Notice

Decision 011/2017: Mr Rob Edwards and Lothian Health Board

Contract information

Reference No: 201602129

Decision Date: 24 January 2017



Scottish Information
Commissioner

Summary

Lothian Health Board (NHS Lothian) was asked for contract information relating to the redevelopment of the Royal Edinburgh Hospital Campus. NHS Lothian withheld some of the information requested on the basis that it was exempt in terms of various provisions of FOISA.

The Commissioner found that NHS Lothian had considered the request under the wrong legislation. The requested information was environmental information and so NHS Lothian should have considered it under the Environmental Information (Scotland) Regulations 2004 (the EIRs)

The Commissioner required NHS Lothian to respond to the request under the EIRs.

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) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 16 (Review by Scottish public authority)

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 4 September 2016, Mr Edwards made a request for information to NHS Lothian. The information requested was:
 - ... full copies of the original contract for the Redevelopment of Royal Edinburgh Hospital Campus project, including the financial model and any related correspondence, appendices, annexes or financial information.*
 - ... details of any subsequent refinancing deals for the project, including any related correspondence, reports or other financial information.*
2. NHS Lothian responded on 4 October 2016. Following discussion with the Scottish Futures Trust (SFT), it informed Mr Edwards that there were standard provisions for the Non Profit Distributing model contract regarding information the parties to the contract considered commercially sensitive. It stated that the contract in question had a provision to the effect that generally, commercially sensitive information should only be published two years after handover.
3. NHS Lothian also informed Mr Edwards that it intended to publish redacted copies of the project agreement within the following month. It stated that in line with FOISA, the redacted information was exempt in terms of sections 33(1)(b), (2)(a) and 2(b) (Commercial interests and the economy); 36(2) (Confidentiality), and 38(1)(b) (Personal information).
4. In relation to the information that NHS Lothian intended to publish, it informed Mr Edwards that it was relying upon section 27(1) of FOISA .

5. On 10 October 2016, Mr Edwards wrote to NHS Lothian requesting a review of its decision. In particular, Mr Edwards asked whether it was in the public interest to keep key financial information secret.
6. NHS Lothian notified Mr Edwards of the outcome of its review on 7 November 2016. NHS Lothian essentially upheld its original decision, and also informed Mr Edwards that the redacted agreement had been published. It provided a web link to where it could be accessed.
7. On 21 November 2016, Mr Edwards wrote to the Commissioner. He applied 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 specified modifications. Mr Edwards stated he was dissatisfied with the outcome of NHS Lothian's review because he considered there to be a powerful public interest in understanding the application of the £6 billion or so used to finance major public sector projects in conjunction the SFT.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mr Edwards made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision. The case was allocated to an investigating officer.
9. On 20 December 2016, the investigating officer notified NHS Lothian in writing that an application had been received from Mr Edwards, 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.
10. In particular, NHS Lothian was asked if it had considered whether Mr Edwards' information request should have been handled as a request for environmental information, to be handled under the EIRs. NHS Lothian was asked to comment on whether it considered its review outcome to have met the requirements of either FOISA or the EIRs.
11. NHS Lothian responded on 16 January 2017. NHS Lothian agreed that the information requested was environmental information and should have been handled in terms of the EIRs. It confirmed that it should, therefore, have applied the exemption in section 39(2) of FOISA (see below).
12. NHS Lothian also confirmed that it would take steps to deal with Mr Edwards' request in terms of the EIRs and issue him with an appropriate response. NHS Lothian stated that it intended to provide Mr Edwards with a compliant review outcome by 14 February 2017.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to her by both Mr Edwards and NHS Lothian. She is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

14. The relationship between FOISA and the EIRs was considered at length in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹. Broadly, in the light of that decision, the Commissioner's general position is as follows:
- (i) The definition of what constitutes environmental information should not be viewed narrowly.
 - (ii) 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.
 - (iii) Any request for environmental information therefore **must** be handled under the EIRs.
 - (iv) In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
 - (v) If the authority does not choose to claim the section 39(2) exemption, it must respond to 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).
 - (vi) Where the Commissioner considers a request for environmental information has not been handled under the EIRs, she is entitled (and indeed obliged) to consider how it should have been handled under that regime.
15. Given the nature of the subject matter of the request, the Commissioner asked NHS Lothian to consider whether the request properly fell to be handled as a request for environmental information, and therefore responded to under the EIRs. Having taken guidance from the SFT and the project solicitors, NHS Lothian agreed that it should have responded under the EIRs and not solely under FOISA. In doing so, it confirmed it should have applied section 39(2) of FOISA.
16. It is clear from NHS Lothian's correspondence with the Commissioner that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns the redevelopment of a major hospital campus, and the Commissioner is satisfied that it would fall within either paragraph (a) of the definition of environmental information contained in regulation 2(1) of the EIRs (as information on the state of the elements of the environment) or paragraph (c) of that definition (as information on measures affecting or likely to affect those elements).
17. Given that the information requested is environmental information, NHS Lothian had a duty to consider it as a request in terms of regulation 5(1) of the EIRs.

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) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, NHS Lothian informed the Commissioner that in responding to Mr Edwards' request it should

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>

have relied upon section 39(2) of FOISA, and provided him with a response in compliance with the EIRs.

19. In this case, the Commissioner accepts that NHS Lothian is entitled to apply this exemption to Mr Edwards' request, given her conclusion that the information requested is properly classified as environmental information. As there is a separate statutory right of access to environmental information available to the applicant, the Commissioner also accepts that, in this case, the public interest in maintaining this exemption and in handling 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.

Regulation 16 of the EIRs

21. Regulation 16 of the EIRs states that, on receipt of a requirement to conduct a review, the authority shall review the matter and decide whether it has complied with the regulations within 20 working days (regulations 16(3) and (4)). It also states that where an authority has not complied with its duty under the EIRs, it shall immediately take steps to remedy the breach of duty (regulation 16(5)).
22. Although NHS Lothian responded to Mr Edwards' request on 4 October 2016 and his request for review on 7 November 2016, as explained above, this was as a result of NHS Lothian considering the request in terms of FOISA and not the EIRs.
23. It is apparent that NHS Lothian failed to respond to Mr Edwards' request of 4 September 2016 in terms of the EIRs, and therefore failed to comply with regulation 5(1) of the EIRs. It is also apparent that NHS Lothian failed to carry out a review meeting the requirements of regulation 16 of the EIRs.
24. The Commissioner therefore requires NHS Lothian to provide a response to Mr Edwards' requirement for review of 10 October 2016, in terms of regulation 16 of the EIRs. She would note that she would expect such a review outcome to include full reasons for its decision on review, particularly where that decision differed from its original decision in relation to the request.
25. The Commissioner's decision below states a compliance date of 10 March 2017 in line with the approach and timescales she is required to follow. This is the latest day on which NHS Lothian must issue a response but this does not prevent it issuing one sooner. The Commissioner would encourage NHS Lothian to provide Mr Edwards with a response in line with the timescales it provided to the Commissioner (i.e. 14 February 2017).

Decision

The Commissioner finds that Lothian Health Board (NHS Lothian) failed to comply with the requirements of regulations 5(1) and 16 of the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to Mr Edwards' information request and requirement for review.

The Commissioner requires NHS Lothian to provide a response to Mr Edwards' requirement for review, in terms of regulation 16 of the EIRs, by **10 March 2017**.

Appeal

Should either Mr Edwards or NHS Lothian 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.

Enforcement

If NHS Lothian fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that NHS Lothian has failed to comply. The Court has the right to inquire into the matter and may deal with NHS Lothian as if it had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner

24 January 2017

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

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- (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)-

...

- (b) is subject to regulations 6 to 12.

...

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.

- (2) Representations under paragraph (1) shall be made in writing to the Scottish public authority no later than 40 working days after either the date that the applicant receives any decision or notification which the applicant believes does not comply with these Regulations or the date by which such a decision or notification should have been made, or any other action should have been taken, by the authority but was not made or taken.

- (3) The Scottish public authority shall on receipt of such representations-

- (a) consider them and any supporting evidence produced by the applicant; and
- (b) review the matter and decide whether it has complied with these Regulations.

- (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.

- (5) Where the Scottish public authority decides that it has not complied with its duty under these Regulations, it shall immediately take steps to remedy the breach of duty.

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