

Decision Notice



Decision 037/2011 David McLaughlin and South Ayrshire Council

Footpath condition and maintenance

Reference No: 201001797

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Scottish Information Commissioner

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Summary

Mr McLaughlin requested from South Ayrshire Council (the Council) information relating to a section of footpath on the south side of the River Ayr, its condition and maintenance. The Council initially sought clarification before it responded by providing information. Following a review, Mr McLaughlin remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council should have dealt with the request under the EIRs. However, while finding certain technical failures in the Council's handling of the request, he was also satisfied that all relevant information held by the Council had been provided to Mr McLaughlin. Consequently, he did not require the Council to take any action.

Relevant statutory provisions and other sources

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

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a), (c) and (f) of "environmental information") and 5(1) and (2)(a) (Duty to make available environmental information on request)

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 14 May 2010, Mr McLaughlin's solicitor wrote on his behalf to the Council, requesting the following information (for the period 1 March 2009 to 1 May 2010) and referring to an enclosed map:
 - i) Whether or not the footpath on the south side of the River Ayr north of Ayr Shopping Centre, as shown on the enclosed map, is owned by the local authority;
 - ii) Details of all complaints about the state of the footpath;
 - iii) Details of inspections of the footpath;



- iv) Details of maintenance, including maintenance by independent contractors, to the footpath;
 - v) Details of all correspondence to and from independent contractors relating to work carried out by them on the footpath;
 - vi) Details of all correspondence from the local authority to third parties requesting repair to defects on the footpath;
 - vii) Details of all compensation payments made by the local authority to any party for property damage or personal injury due to defects on the footpath (indicating that for the avoidance of doubt, this included details of the exact location of the defect giving rise to compensation claims);
 - viii) Details of the local authority's policy for the verification of complaints of defects received by them, either from members of staff or members of the public, to the footpath current during the specified period;
 - ix) Details of the local authority's policy for the categorisation and prioritisation of repairs to defects in the surface of the footpath current during the specified period;
 - x) Details of the local authority's policy relating to the maximum time within which defects or damage to the surface of the footpath should be repaired according to their categorisation current during the specified period.
2. The Council sent Mr McLaughlin's solicitor an email on 19 May 2010, advising that it had not received the map referred to in the above request and seeking a copy. This was provided by email on the same day, when Mr McLaughlin's solicitor also provided further information on the location of the footpath. On 20 May 2010, the Council acknowledged the request as having been received on 19 May.
3. On 24 May 2010 the Council appears to have telephoned Mr McLaughlin's solicitor to obtain further clarification of the location of the footpath. This was followed by an email from the Council on 26 May 2010, asking for the footpath to be highlighted on a copy of the map.
4. Later (on 23 June 2010), Mr McLaughlin's solicitor faxed a letter to the Council requesting a review on his behalf, on the grounds that it had failed to respond within the required timescale and had not provided the information requested.
5. The Council acknowledged receipt of Mr McLaughlin's request for review (by email on 24 June 2010), but notified him that it was not required to undertake a review as it was still awaiting the clarification sought on 26 May as to the exact location of the footpath. On the same day, Mr McLaughlin's solicitor advised the Council that in his view sufficient clarification had in fact been given and once again asked the Council to carry out a review.



6. The Council replied to Mr McLaughlin's solicitor on 25 June 2010, explaining it would assist greatly in the processing of his request if a more exact location could be provided. However, it also indicated that it would proceed with his request (although not a review) on the basis of an assumption as to the location in question. Further correspondence and a telephone call from Mr McLaughlin's solicitor would appear to have indicated that he had a longer stretch of the footpath in mind than that referred to by the Council.
7. On 15 July 2010 Mr McLaughlin's solicitor wrote to the Council, reminding it of the request for review and asking why no review had been conducted.
8. On 22 July 2010 the Council sent a response to Mr McLaughlin's request, disclosing information in response to all but 2 of the points in the request. For points 5 and 6, it explained that no independent contractors or other third parties had been employed by it on the relevant section of footpath over the specified period, and therefore the requested information was not held.
9. On 30 July 2010, Mr McLaughlin's solicitor wrote to the Council on his behalf, requesting a review of its response and indicating why it did not consider certain aspects of the response to meet the relevant points in the request.
10. On 24 August 2010 the Council issued its response to this request for review, responding to each of the points raised in the letter of 30 July. It also advised Mr McLaughlin of his right to request a review and to apply to the Commissioner for a decision.
11. On 14 September 2010 Mr McLaughlin 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.
12. The application was validated by establishing that Mr McLaughlin 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. The case was then allocated to an investigating officer.

Investigation

13. On 23 September 2010 the investigating officer 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 provide details of the searches it had undertaken to ascertain what information was held. The Council was also asked to comment on whether it considered the request should have been dealt with under the EIRs.



14. In its response, the Council provided an overview of the searches it had undertaken to establish what information it held with respect to Mr McLaughlin's request, together with other comments on the relevant records. The Council also acknowledged that the requested information was environmental information as defined in regulation 2(1) of the EIRs, and indicated that it wished to apply the exemption in 39(2) of FOISA.
15. The investigating officer requested and received additional submissions from the Council regarding the records it maintained and the means by which information falling within the scope of Mr McLaughlin's request could be identified from such records. The submissions received from both the Council and Mr McLaughlin (or on his behalf), insofar as relevant, 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 him by both Mr McLaughlin (or on his behalf) and the Council and is satisfied that no matter of relevance has been overlooked.

Section 39(2) of FOISA – environmental information

17. The Commissioner 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* and need not repeat it in full here. In this case, the Council submitted in the course of the investigation that it was entitled to withhold the information requested, as environmental information, under section 39(2) of FOISA. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs, the relevant paragraphs of which are reproduced in the Appendix below.
18. In this case, Mr McLaughlin has requested specified information relating to the condition and maintenance of a section of pathway beside a river. Given the terms of the request, and having considered the information already disclosed by the Council, the Commissioner agrees that the requested information would fall within the definition of environmental information set out in regulation 2(1) of the EIRs, specifically paragraphs (a), (c) and (f) of that definition. However, while he is pleased to note that the Council accepted this in the course of the investigation, he must also note that it did not do so (and act accordingly under the EIRs) when dealing with Mr McLaughlin's information request. As he found in *Decision 218/2007*, a Scottish public authority has an obligation to deal with a request for environmental information under the EIRs: in failing to do so, he finds that the Council failed to comply with regulation 5(1) of the EIRs.



19. 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, the Commissioner accepts that the Council was entitled to apply the exemption to the withheld information, given his conclusion that it is properly considered to be environmental information.
20. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. 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 dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. The Commissioner has consequently proceeded to consider this case in what follows solely in terms of the EIRs.
21. The Council adopted the position that it had identified and provided all the information it held, given the terms of Mr McLaughlin's request.

Regulation 5 of the EIRs

22. Regulation 5(1) of the EIRs 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 it should hold, but in fact does not (although consideration of what it should hold will generally be an aspect of the Commissioner's investigation).
23. Mr McLaughlin was dissatisfied with the information provided in response to his request, believing there to be a failure to identify and disclose all the relevant information the Council held. When seeking a review of the Council's handling of this request, Mr McLaughlin expressed dissatisfaction in respect of the information supplied for only 6 of the 10 parts of his request, correlating to points 1, 2, 3, 4, 7 and 9 as set out in paragraph 1 above: the investigation has therefore been confined to these points. Mr McLaughlin's application referred in particular to the Council's failure to identify the various inspection routes along the Ayr River Walk, in the absence of which he did not believe he could assess whether the information provided in relation to complaints, inspections, maintenance and repairs complied with his request.
24. During the investigation, a detailed explanation was sought from the Council on the searches undertaken by it for any information falling within the scope of the request. Details were provided by the Council of the members of staff consulted, the locations searched, the search terms used (where relevant) and the reasons for using these parameters. Clarification of the relevant records maintained by the Council was also obtained. Explanations were provided of the information held, the policies and processes relating to it, and why the staff involved would be expected to know what information was held.
25. In respect of points 1-4 inclusive (which Mr McLaughlin did not consider to have been answered previously), the Commissioner notes that in its response to Mr McLaughlin's request for review, the Council:



- confirmed that it owned the paths on both sides of a section of the River
 - confirmed the instruction references for the recorded complaints it considered were covered by the request
 - described the paths covered by the relevant inspection route
 - confirmed the instruction reference for the only maintenance works it considered to be covered by the request.
26. In respect of point 7, Mr McLaughlin did not consider the exact location of the relevant defect to have been provided. On review, the Council provided a brief description of the location for the only relevant claim.
27. With regard to point 9, Mr McLaughlin did not believe he had been provided with certain specific categories of information in relation to the Council's policy for the categorisation of repairs. The Commissioner notes, however, that these categories were not specified in the original request, which simply sought details of the relevant policy. The Council maintained that it had provided all the information it held in relation to this policy.
28. The Commissioner has considered carefully the terms of McLaughlin's request in relation to the above points, together with the information the Council provided in response. He has also considered carefully the information provided by the Council on the searches it conducted, and its explanations of what it recorded and retained in this connection.
29. Having considered all the submissions he has received, therefore, the Commissioner is satisfied that the Council had, by the time it completed its review, carried out all searches reasonably required to identify and locate the information covered by the terms of Mr McLaughlin's request in respect of points 1, 2, 3, 4, 7 and 9, and in the circumstances he is also satisfied that the Council held no further information covered by these points.

Technical breaches of the EIRs

30. In his application to the Commissioner, Mr McLaughlin complained that the Council did not meet the relevant statutory timescales when responding to his request.
31. Under the EIRs, authorities have 20 working days in which to comply with requests for information (regulation 5(2)(a)).
32. The Commissioner notes the Council's attempts to clarify Mr McLaughlin's request in May and June 2010, and also the Council's correspondence with Mr McLaughlin explaining its reasoning for not providing a response to the request without first obtaining such clarification. He also notes that it is clear from the correspondence and telephone calls described above that Mr McLaughlin considered he had provided sufficient clarification with which to proceed on or before 24 May 2010.



33. The Council advised that it had tried to identify the exact location Mr McLaughlin was concerned about, in an effort to be of assistance and provide accurate information. It also confirmed in the course of the investigation that it had received the map referred to in Mr McLaughlin's request on 19 May 2010.
34. The Commissioner notes that, on 19 May 2010, Mr McLaughlin's solicitor confirmed that the path he was concerned about was located on the south side of the river, north of Mill Street. It does not appear to the Commissioner that, following the provision of this information, Mr McLaughlin's request could be said to be formulated in too general a manner to permit a response to be provided. Consequently, while the Council might have found it helpful to receive further locational information to assist in its processing of the request, he is not satisfied in this case that it was entitled to refuse to deal with the request after 19 May, on the basis that the request required further clarification. In so refusing, the Commissioner considers that Council failed to respond to Mr McLaughlin's request within 20 working days after the date of receipt, as required by regulation 5(2)(a) of the EIRs.

DECISION

The Commissioner finds that South Ayrshire Council (the Council) failed to comply with the Environmental Information (Scotland) regulations 2004 (the EIRs) in responding to the information request made by Mr McLaughlin. In particular, in failing to identify the information requested as environmental information (as defined in regulation 2(1)) and deal with the request accordingly under the EIRs, it failed to comply with regulation 5(1) of the EIRs.

The Commissioner also finds that the Council failed to comply with Mr McLaughlin's request within the period of 20 working days required by regulation 5(2)(a) of the EIRs.

Given that the Commissioner is satisfied that all the relevant information held by the Council at the time it received Mr McLaughlin's request has been disclosed, the Commissioner does not require the Council to take any action in this case.



Appeal

Should either Mr McLaughlin or South Ayrshire 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
2 March 2011



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

...