

Decision Notice

Decision 040/2015: Mrs L and Glasgow City Council

Cost of road resurfacing

Reference No: 201500009

Decision Date: 26 March 2015



Scottish Information
Commissioner

Summary

On 8 July 2014, Mrs L asked Glasgow City Council (the Council) for information relating to the resurfacing of a road. The Council informed Mrs L that her request fell to be considered under the EIRs and issued her with a fees notice.

Ms L paid the fee requested, following which the Council informed her that the information was excepted in terms of regulation 10(5)(e) of the EIRs.

During the investigation, the Council provided Mrs L with information that satisfied her request.

The Commissioner investigated and found that the Council failed to consider whether it had a duty to provide the information requested under regulation 5(1) of the EIRs, before issuing a fees notice. She also found that the Council failed to comply with the time limit set in the EIRs for complying with the request.

The Commissioner also commented that the Council's handling of the request fell far short of that expected from a Scottish public authority.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) and (2) (Duty to make available environmental information on request); 8(1), (4), (5), (6) and (7) (Charging); and 13 (Refusal to make information available)

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.

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. The obligations in regulation 5(1) are subject to regulation 5(2). Regulation 5(2)(a) states that the duty under 5(1) 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. Regulation 5(2)(b) provides that the regulation 5(1) duty is subject to regulations 6 to 12.

Background

1. On 8 July 2014, Mrs L made a request for information to the Council. The information requested included information on the cost of resurfacing Langside Road between Queen's Park Drive and Calder Street "which was carried out in the last few months and, separately, the most recent resurfacing work".
2. The Council wrote to Mrs L on 28 July 2014. It informed her that it considered the information requested to be environmental information and as such the request fell to be considered under the EIRs. The Council informed Mrs L that prior to providing the information requested, regulation 8 of the EIRs allowed the Council to charge a fee. It explained that it considered a fee of £25.34 applied and that once the fee was paid, the Council would "... comply with your request within the timeframe of the legislation, except to the extent that any material is exempt".

3. Ms L paid the required fee with a cheque dated 5 August 2014. On 13 August 2014, the Council acknowledged receipt of Mrs L's cheque and sought her address in order to process the payment. Mrs L provided this the following day.
4. The Council responded to Mrs L's request on 14 October 2014. The Council stated that it had received the required payment on 23 September 2014 and notified Mrs L that it considered the information requested to be exempt in terms of regulation 12(5)(e) of the EIRs as disclosure would adversely affect its commercial interests. (This should have read regulation 10(5)(e).) The Council answered some subsidiary questions, which are not under consideration in this decision.
5. On 14 October 2014, Mrs L wrote to the Council requesting a review of its decision.
6. The Council notified Mrs L of the outcome of its review on 11 November 2015. While amending its reasons for doing so, the Council upheld its application of regulation 12(5)(e) of the EIRs. (Again, this should have read regulation 10(5)(e)).
7. The Council apologised for failing to respond to the request within the time allowed and further stated that as the information requested could not be disclosed, the fee paid would be returned within the following four weeks (i.e. by 12 November 2014).
8. On 29 December 2014, Mrs L wrote to the Commissioner. She 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. Mrs L stated she was dissatisfied with the outcome of the Council's review because the Council had
 - (i) not provided the information requested;
 - (ii) not responded within the time allowed;
 - (iii) given the wrong date for receipt of her payment, and
 - (iv) failed to return the fee paid.

Investigation

9. The application was accepted as valid. The Commissioner confirmed that Mrs L 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.
10. On 23 January 2014, the Council was notified in writing that Mrs L had made a valid application. The Council was asked to send the Commissioner the information withheld from her. The Council provided the information and the case was allocated to an investigating officer.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions. In particular, the Council was asked to explain why it had handled the request as it did, and to justify its reliance on any provisions of FOISA and the EIRs it considered applicable to the information requested.
12. The Council responded on 4 March 2015, indicating that it was to provide Mrs L with the cost of the resurfacing the road in question. It also explained that the subsequent repair had been carried out under the contract guarantee and that no additional cost had been incurred.

13. The Council accepted that there had been a number of failings in its handling of Mrs L's request. It acknowledged that a fees notice should not have been raised until it had considered whether the information could be provided. It further accepted that there had been errors relating to the date on which the payment had been received, and that the response was unacceptably late. The Council confirmed that it had issued a refund to Mrs L.
14. Mrs L acknowledged receipt of the information provided by the Council and confirmed that the fee had been repaid. Mrs L withdrew her application as it related to the application of regulation 10(5)(e) of the EIRs, as she was satisfied with the information provided.
15. Mrs L did not withdraw her application in relation to the way in which her request was handled as she remained dissatisfied. In particular, she was dissatisfied with the Council's actions in relation to the issuing of the fees notice, the time taken to respond and the inaccuracies within the correspondence. It is these issues that the Commissioner considered.

Commissioner's analysis and findings

16. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both Mrs L and the Council. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

17. It is clear from the Council's correspondence with Mrs L and 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 relates to road resurfacing under a maintenance contract and, as such, the Commissioner is satisfied that it would fall within either paragraph (a) or paragraph (c) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in the Appendix to this decision). Mrs L has not disputed the application of the EIRs to her case and the Commissioner will consider the request in what follows solely in terms of that regime.
18. In relation to the Council's handling of the request, the issue to be considered in this investigation is whether the Council responded to Mrs L's request in compliance with regulation 5(1) of FOISA. This includes the issuing of a fees notice under regulation 8(1) and the time taken to respond, in terms of regulations 5(2)(a) and 13(a).

Regulation 8 of the EIRs - charging

19. The Council issued a fees notice in terms of regulation 8 of the EIRs. Regulation 8(1) states that where a Scottish public authority is under a duty to make environmental information available under regulation 5(1), it may charge a fee for so doing. In other words, the fee is for making the information available.
20. Regulation 8(1) is subject to qualifications in regulation 8(2) to (7). By virtue of regulation 8(4) and (6), the authority may require the payment of the fee in advance of making information available, in which case it is not required to make the information available unless the fee is paid. Regulation 8(4) specifically makes reference to payment being required in advance of making information available; setting an expectation that the information will be provided once the fee is paid.

21. Where a Scottish public authority can justifiably refuse to provide information because an exception in regulation 10 applies, then the authority does not have a duty to produce the information. Given the provisions described above, this does not appear to be the position once a fees notice is issued: the only thing required to trigger disclosure of the information will be payment of the fee.
22. In the Commissioner's view, therefore, a Scottish public authority should only issue a fees notice under the EIRs where it has first come to the conclusion that it has a duty to provide the information to which the notice relates. In other words, the information cannot be charged for, and then excepted and withheld under regulation 10. The authority must satisfy itself that information can be disclosed before issuing a fees notice.
23. The Commissioner acknowledges that regulation 8(6) disapplies regulation 13 (which relates to refusing to make information available) pending payment of a fee charged in advance. In her view, this is to allow for some of the requested information to be withheld, not all of it. She does not accept that interpreting it otherwise would be consistent with regulation 8 read as a whole, the underlying presumption of which is that information will be made available if a fee is paid.
24. This argument is reinforced by the decision of the European Court of Justice in Case 217/97 Commission v Federal Republic of Germany. The Court concluded that German legislation failed to comply with Directive 90/313/EEC on public access to environmental information by failing to provide that a charge is to be made only where information is in fact supplied.
25. In this case, it is apparent that the Council issued the fees notice before considering whether the information should be excepted from disclosure. The notice stated that once the fee was received, the Council would comply with the request within the timeframe of the legislation, except to the extent that any material was exempt. In the Commissioner's view, this was not something it was entitled to do.
26. The Commissioner concludes that the Council was not entitled to issue the fees notice and, in doing so, failed to comply with regulation 5(1) of the EIRs (noting that the Council accepted this during the investigation).

Time taken to respond

27. Regulation 13(a) of the EIRs states that where information is being withheld in terms of an exception, an authority must respond no later than 20 working days after the date of receipt of the request. As indicated above, regulation 8(6) provides that the authority is not obliged to comply with regulation 13 pending payment of a fee charged in advance.
28. Here, the Commissioner has concluded that no fee was payable. Consequently, regulation 13(a) applied from the date of receipt of the request and the Council was obliged to give Mrs L notice of its decision to withhold the information, within 20 working days of that date of receipt.
29. Given that the Council did not issue a refusal notice in respect of Mrs L's request of 8 July 2014 until 14 October 2014, the Council failed to comply with regulation 13(a) of the EIRs.
30. The terms of the refusal notice eventually given to Mrs L do not fall within the scope of Mrs L's application. In these circumstances, the Commissioner will not require the Council to take any action in respect of the failures she has identified, in response to Mrs L's application.

General comment

31. Neither the Council's failure to return Mrs L's fee promptly, nor its failure to provide the correct date of receipt in its refusal notice, are matters provided for in either the EIRs or the relevant Code of Practice. So they are not material to the Commissioner's findings in relation to compliance with the EIRs in this case. Nevertheless, the Commissioner considers these aspects of the way in which Mrs L's request was handled merit comment, as they fall far short of the standards she would expect from any Scottish public authority responding to a request for information.
32. In this case, Mrs L was not only incorrectly charged a fee, but the Council failed to pick this up when it carried out its review, and it took an application to the Commissioner to get her a refund. While the Council has acknowledged the error, the Commissioner would advise the Council to review whether this was simply that, an error, and whether its arrangements for responding to information requests (and review requests) are sufficiently clear that, if followed, the error should not recur. This will both ensure good standards of service for requesters, and contribute to efficient request handling.

Decision

The Commissioner finds that Glasgow City Council failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mrs L.

She finds that the Council failed to consider whether it had a duty to provide the information requested under regulation 5(1) of the EIRs, and therefore comply with regulation 5(1), before issuing a fees notice under regulation 8(5). She also finds that the Council failed to comply with the time limit in regulation 13(a) of the EIRs.

Appeal

Should either Mrs L or Glasgow City Council 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.

Rosemary Agnew
Scottish Information Commissioner

26 March 2015

Appendix 1: Relevant statutory provisions

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;

...

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.

...

8 Charging

(1) Subject to paragraphs (2) to (8), where a Scottish public authority is under a duty to make environmental information available under regulation 5(1), it may charge a fee for so doing.

...

(4) A Scottish public authority may require that payment of the whole or part of a fee under paragraph (1) be made in advance of making information available.

(5) Where a Scottish public authority imposes a requirement under paragraph (4) it shall notify the applicant in writing.

(6) Where a Scottish public authority has notified an applicant that advance payment is required under paragraph (5) then that authority is not obliged to-

(a) make the information requested available under regulation 5(1); or

(b) comply with regulations 6, 7 or 13,

unless the fee is paid; and any such fee must be paid within a period of 60 working days beginning with the day on which the authority gave such notification.

- (7) No working day from and including the day on which notice under paragraph (5) is given up to and including the day on which a fee is paid shall count for the purposes of determining any period of working days in accordance with regulations 5(2)(a), 6(2)(a) and 13(a).

...

13 Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-

- (a) be given in writing as soon as possible and in any event no later than 20 working days after the date of receipt of the request for the information;

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info