

Decision Notice 045/2020

Safer Routes to School Report / Green Travel Plan

Applicant: The Applicant

Public authority: East Lothian Council

Case Ref: 201902168



Summary

The Council was asked about a Safer Routes to School Report and a Green Travel Plan.

The Council considered the request under the EIRs and issued a fees notice to cover staff costs, payment of which was required before any information was disclosed.

The Applicant disputed the information covered by the request was environmental, and applied to the Commissioner for a decision.

The Commissioner investigated and found that the information was environmental (and so the Council was required to deal with the request under the EIRs).

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections (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) (paragraphs (a), (b), (c), (d) and (f) of definition of “environmental information”)

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 22 September 2019, the Applicant made a two-part request for information to East Lothian Council (the Council). The information requested was as follows:
 - (i) Referring to a published “Safer Routes to School Report” [now entitled “Safer Active Travel Report”¹] by consultants, the Applicant was interested in learning what led to the delay between the original time it had been hoped to produce that Report and the Report’s recent appearance, and the changes (if any) in the contents. To that end, he asked for the exchanges both inside the Council and with other bodies, such as Sustrans and the consultants, that took place starting with the first draft of the Report (delivered to the Council in Spring 2018), and ending with the Report’s delivery in the final published form, and relating to the North Berwick part of the report.
 - (ii) Referring to a revised “Green Travel Plan” which the developer at Ferrygate Meadows, to the West of North Berwick, had been asked to produce to fulfil a requirement of the planning consent for that development, the Applicant noted the original travel “pack” was considered by the On the Move Group of North Berwick Area Partnership in 2017, the Chair of which had submitted a letter to the Council criticising the developer’s plan. He asked to see the consideration given to that letter and its content from the time it was submitted, by all those involved in the Council, and any exchanges with the developer regarding development of a proper plan to meet the planning requirement.

¹ https://www.eastlothian.gov.uk/downloads/download/13225/safer_active_travel_-_law_primary_and_north_berwick_high_school

2. The Council responded on 11 October 2019. The Council considered the request under the EIRs and issued a fees notice in respect of staff costs. It explained that it was Council policy, from 2019, to recover full staff costs for every information request received falling under the EIRs, and that it was not obliged to proceed with the request until the fee had been received.
3. On 11 October 2019, the Applicant wrote to the Council, requesting a review on the basis that the Council had mistakenly considered his request as a request for environmental information. He argued that the request was essentially a request to learn about the administration of a road safety review, and did not fall into the class of environmental matter covered by the EIRs.
4. The Council notified the Applicant of the outcome of its review on 22 October 2019, fully upholding its original decision. The Council concluded that the information fell within the scope of definitions (c) and (d) of environmental information in regulation 2(1) of the EIRs. It considered the correspondence sought related to a report and plan that would have a direct impact on emissions and the promotion of sustainable travel (thus meeting the criteria in definition (c)), and the earlier draft of the Report contained information that would likely affect the environment (thus meeting the criteria in definition (d)).
5. On 26 November 2019, the Applicant wrote to the Commissioner, applying 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. The Applicant stated he was dissatisfied with the outcome of the Council's review because he disagreed with its decision to treat the information as environmental. He was further dissatisfied that the Council had conflated his two requests in considering whether they were covered by the EIRs, believing it should have treated them separately, with separate reasoning.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 26 November 2019, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the information withheld from the Applicant (i.e. that being withheld pending payment of the fee). The Council provided the information and the case was allocated to an investigating officer.
8. 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 to answer specific questions. These focused on the Council's consideration of the each part of the request under the EIRs.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

FOISA or the EIRs?

10. In his application to the Commissioner, the Applicant was dissatisfied with the manner in which the Council had interpreted the EIRs in this case. He did not believe that the information requested was environmental information on any reasonable interpretation of the EIRs.
11. In the Applicant's view, any such interpretation was stretching the meaning of "environmental" beyond its normal meaning. He explained that the purpose of the request was to understand whether proper procedures were used, and reasonable diligence was applied, by the Council in the manner in which it dealt with the Safer Routes to School Report and the letter criticising the Green Travel Plan, and was not concerned with environmental consequences or effects. Given this, he argued, using such a wide interpretation was perverse, adversely impacted individuals seeking information on the functioning of the Council, and was contrary to the public interest, good governance and rights under freedom of information legislation.
12. The Applicant further submitted that the Council's decision to consider the request as one for environmental information would clearly extend the scope of the EIRs beyond that which Parliament could reasonably have had in contemplation and would be contrary to the public interest. In his view, as the EIRs applied to a particular class of information, they should be interpreted strictly and not to information beyond a strict interpretation. He argued that the EIRs created a financial obstacle or penalty upon those seeking information, and so should be interpreted narrowly in any circumstances where there was ambiguity as to whether or not the information might be regarded as environmental.
13. Environmental information is defined in regulation 2(1) of the EIRs, and paragraphs (a), (b), (c), (d) and (f) of the definition are reproduced in full in Appendix 1. Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
14. The Commissioner's views on the relationship between FOISA and the EIRs are set out in detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*², and need not be repeated in full here. However, he will reiterate some of the key points which are relevant in this case:
 - The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition of environmental information in 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 a request for environmental information under FOISA, an authority **may** claim the exemption in section 39(2) of FOISA.
15. In this case, the Council applied the exemption in section 39(2) of FOISA and dealt with the request under the EIRs, having concluded that the information was environmental information as defined in regulation 2(1) of the EIRs.

² <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.aspx>

16. The Commissioner must, therefore, first determine whether any of the information falling within the scope of the request is environmental information. Only if it is can the Council be said to have been correct in dealing with the request under the EIRs.
17. For each part of the request, the Council was asked to explain the basis upon which it considered the information to be environmental, with reference to the relevant parts of the definition of environmental information in regulation 2(1). It was also asked to explain whether it had given any consideration to elements of the information not being environmental.

Part 1 of request

The Applicant's submissions

18. In his application to the Commissioner, the Applicant submitted it was obvious that the Report on Safer Routes to School was concerned essentially with the safety of school pupils travelling to and from school. He argued that environmental consequences were secondary and incidental, and that using the fact that there might be environmental consequences as a justification for interpreting the information as environmental was perverse.

The Council's submissions

19. The Council submitted that the Report and the associated study relating to safer active travel addressed road safety concerns and local transport-related issues which might be actual or perceived barriers to encouraging sustainable trips. It explained that the study report examined existing walking and cycling infrastructure, and identified barriers, weaknesses, issues and concerns, along with the impact of current or planned developments in the area.
20. As such, the Council considered the subject matter of the information met the definition (a) in regulation 2(1) of the EIRs, namely elements of the environment, such as land, landscapes and natural sites. In support of this, the Council explained it had considered the Commissioner's guidance on "What is Environmental Information"³, which defines land and landscape (respectively) as "... including buildings and other structures, ... and any right or interest over land" and "... an area, as perceived by people, whose character is the result of the action and interaction of natural and/or human factors".
21. Given that the substance of the Report, the study and the associated information related to roads, walking and cycling infrastructure, which (the Council submitted) could be defined as land-based structures resulting from the interaction of natural and human factors, the Council considered it met definition (a) in regulation 2(1).
22. The Council further submitted that, in addition to the above, it had considered certain previous decisions by the Commissioner:
 - *Decision 218/2007 Professor A D Hawkins and Transport Scotland* - relating to a road building programme where the Commissioner decided the information concerned measures and activities likely to affect the state of the elements of the environment (principally air and landscape), and the information was therefore environmental. The Council submitted the request under consideration here similarly addressed roads infrastructure.

³ <http://itspublicknowledge.info/Law/EIRs/WhatIsEnvironmentalInformation.aspx>

- *Decision 056/2008 Mr Rob Edwards and the Scottish Ministers*⁴ - relating to the M74 completion scheme, where the Commissioner decided the decision-making process relating to environmentally significant schemes was environmental information. The Council submitted that the decision-making process surrounding the assessment of road safety, infrastructure and public concerns to be similarly environmentally significant.
- *Decision 068/2012 Mrs Anne Ewen and the City of Edinburgh Council*⁵ - relating to the condition of a pavement, where the Commissioner decided that information about complaints or accidents at a public footpath was environmental information. That information met the definition in paragraph (c) “measures” (the authority’s policy of inspecting pavements) and “activities” (the authority’s statutory responsibilities), affecting or likely to affect the elements in paragraph (a) (land and landscape). The Council submitted that the assessment of barriers, weaknesses, issues and concerns, and associated exchanges relating to transport infrastructure, similarly met this definition.

23. In light of the above, the Council confirmed that it also considered the information covered by part 1 of the request fell within definition (c) in regulation 2(1) of the EIRs.

The Commissioner’s views – part 1 of request

24. The Commissioner has fully considered the submissions from both parties and the information itself.
25. He notes that the focus of all of the in-scope information for this part is a study on safer active travel, carried out by consultants and leading to a Safer Active Travel Report (formerly known as the Safer Routes to School Report). The information covers consideration of proposed timelines and communications strategy for the study, traffic flow, speed data, junction movements, the draft report itself with comments, funding to tackle any emerging issues/actions, traffic/road safety incidents, bus turning, parking, adoption of roads, works to footways and exchanges re delays in the issue of the report.
26. In the Commissioner’s view, the information falls under the definitions in regulation 2(1) of the EIRs, being measures (in paragraph (c)) (namely a study on safe travel, including consultation, traffic movement/volume, associated issues and necessary actions, leading to a report with recommendations) affecting, or likely to affect the state of the elements of the environment in paragraph (a) (land and landscape, i.e. roads/pavements) and the state of human health and safety in paragraph (f) (conditions of human life affected by these measures and elements). While that may be the Applicant’s opinion, it is not apparent from the information itself that environmental considerations are “secondary and incidental”.
27. In conclusion, the Commissioner is satisfied that all of the information requested in part 1 of the request falls within the definition of environmental information set out in regulation 2(1) of the EIRs, in particular paragraphs (a), (c) and (f) of that definition.

⁴ http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2008/200501950_Part1.aspx

⁵ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2012/201101774.aspx>

Part 2 of request

The Applicant's submissions

28. In his application to the Commissioner, the Applicant argued that the information sought had no direct environmental consequences, nor was it requested to obtain information of an environmental nature. Referring to the long delay between the time of the planning requirement on the developer to submit a Green Travel Plan, and the time when the Council took action to require the developer to submit such a plan, the Applicant contended that the information concerned the manner in which an approach to the Council had been treated, which brought this long delay to the Council's attention more than a year before enforcement action was taken. The Applicant argued that, in these circumstances, it would be unreasonable to interpret the request as one seeking environmental information.

The Council's submissions

29. The Council explained that the Green Travel Plan was submitted by the developer as part of the planning process, as per Condition 7 of Planning Permission (in principle) 14/00632/PPM, which states:

A Green Travel Plan shall be submitted to and approved by the planning authority prior to the occupation of any of the residential units hereby approved. The travel plan shall have particular regard to provision for walking, cycling and public transport access to and within the site, and will include a timetable for its implementation, details of the measures to be provided, the system of management, monitoring, review, reporting and duration of the plan. The Green Travel Plan shall thereafter be implemented in accordance with the details so approved.

Reason: *in the interests of ensuring sustainable travel patterns.*

30. As such, the Council considered the subject of the information met definition (c) in regulation 2(1) of the EIRs, as it addressed "measures" (including plans, programmes, environmental agreements and activities) likely to impact:
- the elements of the environment in paragraph (a) (including air and atmosphere, water, soil, land, landscape and natural sites') by addressing issues of sustainable travel, and
 - the factors in paragraph (b) (such as emissions, discharges and other releases into the environment, affecting or likely to affect the elements in paragraph (a)), by aiming to reduce emissions.
31. The Council also believed the Green Travel Plan qualified as a report on the implementation of environmental legislation and so met definition (d) in regulation 2(1) of the EIRs, given it is a required component of the planning process under the National Planning Policy Framework.
32. In support of the above, the Council explained it had considered the Commissioner's guidance on "What is Environmental Information" regarding the planning process, specifically paragraphs 30 and 32 which state "*Information about planning applications will usually be environmental information, given that the information will, in most circumstances, explicitly relate to plans and developments which will have a direct impact on the land use and landscape of a particular area*" and that "*planning policies, development plans, environmental assessments and similar information are likely to be considered to be 'measures'*". In this regard, the Council considered the Green Travel Plan met these descriptions, as a development plan with a direct impact on land use and landscape.

33. The Council further submitted that, in addition to the above, it had considered certain previous decisions by the Commissioner:
- *Decision 101/2008 Mr Alistair Johnson and East Renfrewshire Council⁶* - relating to a planning application, where the Commissioner decided that information about planning applications [as well as] discussions at pre-application stage could involve consideration of potential effects on the elements of the environment. The Council submitted that the information in the correspondence, prior to submission of the Green Travel Plan, met the definition of environmental information.
 - *Decision 102/2009 Councillor David Alexander and Falkirk Council⁷* - relating to the Falkirk Local Plan, where the Commissioner decided that a Local Plan comprised environmental information, as did officers' observations on councillors' comments/objections on the Local Plan proposals. The Council submitted that the Green Travel Plan and associated exchanges similarly met the definition of environmental information.

The Commissioner's views – part 2 of request

34. The Commissioner has fully considered the submissions from both parties and the information itself.
35. He notes that the focus of all of the in-scope information is the Green Travel Plan, either consideration of comments (in a letter from the North Berwick Area Partnership) on the published Plan, or exchanges between the Council and the developer on the development/creation of the Plan.
36. In the Commissioner's view, the information falls under the definitions in regulation 2(1) of the EIRs, being measures (in paragraph (c)) (namely a Green Travel Plan for a new housing development, looking at ways to travel with the least impact on the environment) affecting, or likely to affect, the state of the elements of the environment in paragraph (a) (land and landscape, i.e. roads/pavements) and factors in paragraph (b) (such as emissions from vehicles: "green driving"), and the state of human health and safety in paragraph (f) (conditions of human life affected by these measures, elements and factors).
37. The Commissioner does not, however, concur with the Council's view that the information also falls under definition (d) in regulation 2(1) as he does not agree that the implementation of a Green Travel Plan equates to a report on the implementation of environmental legislation.
38. While the Commissioner notes the Applicant's views on the nature of the information sought, he must consider the nature of the information actually captured by any given the request. Having considered that information, he would consider it wholly artificial to draw any distinction between the information's essential character as environmental information and the specific (possibly non-environmental) issues identified by the Applicant.
39. In conclusion, the Commissioner is satisfied that all of the information requested in part 2 of the request falls within the definition of environmental information set out in regulation 2(1) of the EIRs, in particular paragraphs (a), (b), (c) and (f) of that definition.

⁶ <http://itspublicknowledge.info/ApplicationsandDecisions/Decisions/2008/200700609.aspx>

⁷ <http://itspublicknowledge.info/ApplicationsandDecisions/Decisions/2009/200801026.aspx>

40. With regard to both parts of the request, the Commissioner notes the Applicant's concern that the EIRs "create a financial obstacle or penalty upon those seeking information" and therefore the definition of environmental information should be interpreted narrowly. However, the Commissioner is equally clear that the provisions of the Aarhus Convention and legislation emanating from it (including the EIRs) are not to be interpreted narrowly, as that would diminish the effectiveness of the legislation in promoting the key Aarhus principles of access to environmental information and public participation in environmental decision-making.
41. The Commissioner has not been asked to consider whether the fee charged in this case complied with the EIRs, but he would note that it is clear from *The Aarhus Convention: an Implementation Guide*⁸ (page 94) that provisions for charging a reasonable amount (as in regulation 8 of the EIRs) should not be applied in a way which may result in persons being dissuaded from seeking to obtaining information, or which may restrict their right of access to that information. In this regard, public authorities should take account of the Commissioner's guidance in "Charging for environmental information"⁹ (and in particular the factors set out in paragraph 12).

Section 39(2) of FOISA – Environmental information

42. 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.
43. The Council informed the Commissioner that it considered the information fell to be considered in terms of the EIRs and therefore wished to rely on section 39(2) of FOISA. As the information comprised "environmental information" as defined in the EIRs, the Council considered disclosure of such information was more appropriately considered under the specific regulatory regime provided for in the EIRs. In the Council's view, the public interest in considering the request in terms of the EIRs outweighed the public interest in disclosure of the information under the terms of FOISA.
44. Having considered the Council's submissions on this point, together with the information itself, the Commissioner accepts that, in this case, the Council was entitled to apply the exemption in section 39(2) to the information withheld under FOISA, given his conclusions (above) that it is properly classified as environmental information.
45. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances of the case, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA.
46. The Commissioner therefore concludes that the Council was correct to apply section 39(2) of FOISA and to consider both parts of the request under the EIRs.

Handling of request

47. As set out above, the Applicant was dissatisfied that the Council had conflated his two requests in considering whether they were covered by the EIRs, believing it should have treated them separately, with separate reasoning. The Council was asked to explain what

⁸ https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

⁹ http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Fees_and_charging/ChargingEIRs.aspx

advice and assistance it gave to allow the Applicant to understand why each part of his request was considered to be for environmental information.

48. In response, the Council maintained that the overall conclusion of its review outcome was correct, i.e. that the request was correctly considered under the EIRs, and the response referenced paragraphs (c) and (d) of regulation 2(1). It accepted, however, that the response could have more clearly identified which of the provisions in the EIRs were considered to apply to each part of the request.
49. In the Commissioner's view, and while this does not amount to a breach of FOISA or the EIRs, it would have been good practice for the Council to have provided separate reasoning for each part of the request, clearly explaining why the Council considered the relevant information to fall under the definition of environmental information. He would ask the Council to reflect on this when responding to future requests.

Decision

The Commissioner finds that (in the respects specified in the Applicant's application) East Lothian Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 and with the Environmental Information (Scotland) Regulations 2004, in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or the 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.

Margaret Keyse
Head of Enforcement

10 March 2020

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;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (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;
- (d) reports on the implementation of environmental legislation;
- ...
- (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);

...

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