

Decision Notice



Decision 051/2014 Mr Paul Bova and Highland Council

Development at Resaurie

Reference No: 201301869

Decision Date: 27 February 2014

www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

On 18 April 2013, Mr Bova asked Highland Council (the Council) for information about a development at Resaurie, Inverness, up to 2 December 2008. The Council responded by disclosing information.

During the Commissioner's investigation, the Council disclosed additional information to Mr Bova. By the close of the investigation, the Commissioner found that the Council had disclosed all the information it held and which was covered by the request. However, by initially withholding some information it later disclosed, the Council failed to deal with the request in accordance with the EIRs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(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) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) (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 18 April 2013, Mr Bova wrote to the Council, requesting the following information about the Barratt development at Resaurie, Inverness, up to 2 December 2008:
All communications, written or oral, also discussions and minutes of meetings and briefings exchanged between Highland Council and third parties/external bodies, for example (but not limited to) SEPA, Barratt etc.
2. The Council responded on 16 May 2013, under the EIRs, supplying Mr Bova with information. It described the searches it had carried out and stated that it had withheld no information falling within the scope of the request.



3. On 10 July 2013, Mr Bova wrote to the Council requesting a review of its decision. He noted that he sought information relating to the entire Barratt interest at Resaurie, but had only received information relating to one site. He also referred to information he expected to have been supplied, but which had not been disclosed.
4. The Council notified Mr Bova of the outcome of its review on 6 August 2013. It explained its searches again. Additionally, as part of the review, it had searched its complaints records and identified some additional information. This was provided to Mr Bova.
5. On 9 August 2013, Mr Bova 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 specified modifications.
6. The application was validated by establishing that Mr Bova made a request for information to a Scottish public authority and 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

7. 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. The Council was asked to describe the steps it had taken to establish what relevant information it held, and also to respond to specific points raised by Mr Bova in relation to information he believed the Council should hold.
8. The Council conducted further searches during the investigation and located additional information, which was disclosed to Mr Bova.

Commissioner's analysis and findings

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



FOISA or the EIRs?

10. The Council dealt with Mr Bova's request under the EIRs. Mr Bova's application to the Commissioner expressed dissatisfaction that the Council had "constrained my request for information subject to the EIRs, whereas my request was also submitted subject to FOI." This is not a point Mr Bova raised with the Council in seeking a review, although it is clear that the initial request was dealt with under the EIRs, but (for the sake of completeness) the Commissioner will set out her position on the appropriate regime below.
11. During the investigation, the Council confirmed to the Commissioner that it considered the information requested to be environmental information, as defined in regulation 2(1) of the EIRs, and that therefore it considered section 39(2) of FOISA to apply to the request.

Is the information environmental information?

12. The Commissioner's view set on the relationship between FOISA and the EIRs is set out in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹ and the Commissioner need not repeat it in full here. It is clear from that decision that a Scottish public authority is obliged to deal with a request for environmental information (as defined in regulation 2(1) of the EIRs) under the EIRs.
13. In the present case, the Council submitted that the information requested fell within paragraph (c) of the definition in regulation 2(1) (see the Appendix to this decision). It referred to a number of previous decisions relating to the same development, in each of which the Commissioner had accepted the requested information fell within the definition of environmental information in the EIRs.
14. The Council supplied the Commissioner with copies of all the information it had disclosed to Mr Bova. It explained that all the information sought represented discussions surrounding Barratt's plans to build housing at Resaurie, correspondence with statutory consultees on those plans or the decision to approve the plans, or compliance with conditions set out in the planning approval.
15. Having viewed the information disclosed to Mr Bova, 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, including land and landscape) or paragraph (c) of that definition (as information on measures, including plans, affecting or likely to affect those elements). Given the terms of the request and the significant nature of the development to which it relates, the Commissioner would expect any information caught by the request to fall within that definition. In the circumstances, she does not accept that applying the EIRs (and only the EIRs) could reasonably be described as "constraining" Mr Bova's request.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200600654.aspx>



Section 39(2) of FOISA

16. 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 this exemption to the information requested by Mr Bova, given her conclusion that it would all be environmental information.
17. The exemption in section 39(2) 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 Mr Bova in this case, the Commissioner has also concluded that the public interest in maintaining this exemption, and in dealing with the request in line with the EIRs, outweighs the public interest in disclosure of the information under FOISA.

Has all relevant information been identified, located and provided by the Council?

18. 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. This obligation relates to information held by an authority when it receives a request. Although the Commissioner will always take into account any relevant submissions provided by the applicant, this is not necessarily to be equated with information the applicant believes the authority *should* hold.
19. Mr Bova's requirement for review provided examples of documents he expected to be held by the Council (but which had not been provided). Mr Bova copied further documents to the investigating officer: he explained why he believed these indicated the Council had not provided all the information it held. The Council was asked for its comments on these submissions.
20. The Council's initial response to Mr Bova explained that key staff had been asked to carry out searches of email inboxes and shared drives using the terms "Resaurie", "Barratt" and "Pinefields". This was confirmed in its review response and its submissions to the Commissioner. It explained that staff in Planning and TECs (Transport, Environmental and Community Services, whose staff were involved in relation to flood risk and roads) had carried out searches of their file stores and email inboxes, in accordance with instructions referring to the above search terms and the terms of the request. A copy of the instructing email was provided to the investigating officer: from this email, the Commissioner is satisfied that the instructions were adequate in the circumstances.
21. The Council also explained that the date range of Mr Bova's request related to a previous request, and it had carried out the same searches in 2012. The information found during the 2012 searches did not require to be searched for again, the Council submitted, as it had already been gathered.
22. The Council explained that the results of its searches for the present case were sifted to establish whether information fell within the scope of Mr Bova's request and whether any exceptions applied.



23. Referring to the terms of Mr Bova's request, the Council noted that he had already looked at the planning files. For this reason, the Council explained, it did not refer to any published files within its searches, or make any reference to them in its response. It submitted that the searches of inboxes and file shares would have produced information which had already been placed in the application file, but which was still held by Council officers.
24. The Council was asked to provide a link to any online planning information that related to this development and specifically to Mr Bova's request. The Council confirmed that the case files relating to Mr Bova's request were not available online. The Council explained that its E-planning system only came online in 2010 and the applications referred to by Mr Bova were from 2007 and 2009. Only the reports to committee would be online.
25. Mr Bova expressed concern that mailboxes of individual Council officers had been deleted when these officers left the Council. He believed such information should be retained, particularly where it was of relevance to an ongoing development. The Council was asked if it had a policy on permanent retention of relevant records from staff inboxes when staff left its employment. If so, it was asked to provide a copy, highlighting any relevant passages.
26. The Council responded that it did not have any corporate policy or guidance in relation to retaining records from personal email inboxes. It explained that its staff were expected to comply with the Council's records management policy.
27. The Council was also asked if it had a policy on the permanent retention of relevant planning records (i.e. what information would be retained in respect of a planning matter and what deleted as not requiring to be kept in the permanent record). If so, it was asked to provide a copy, highlighting any relevant passages.
28. The Council explained that records retention was applied to the case file. It was the case officer's responsibility to decide which correspondence should be placed in the file. In many cases, the Council commented, email was only used to send supporting documents. If there was no information in the email text, the Council would load the supporting documents into its E-planning system (or previously into the paper case file). The Council stated that once this had been done, the email itself was of no value. On the other hand, the email should be retained in the relevant permanent record where its content should be part of that record – email should not be used to store important records.
29. Mr Bova referred to an email from the Council to SEPA, a copy of which he had obtained from SEPA. The Council confirmed that it had also obtained copy from SEPA and noted that this was an example of an email whose content added nothing to the record. It sought the return of a plan, which would be placed in the case file once returned. The email would then be deleted as it was of no further relevance. Had it still been held, the Council considered it would have been located using the search criteria applied.
30. Mr Bova also referred to communications involving the Council's Service Centre. The Council stated that its Service Centre did not hold any emails going back as far as 2008. Searches carried out by the Service Centre had not been able to locate anything relevant.



31. Mr Bova also referred to a conditional consent from 1981, which he expected the Council to hold. The Council confirmed that its area planning manager had checked the CD of planning applications for 1981 and found no documentation for this case. Its destruction policy stated that documentation for such applications would be held for 15 years, and commented that the paperwork appeared to have been disposed of some time ago. Information was contained in the paper planning register, but not communications with third parties (which was the subject of the request).
32. In relation to complaints correspondence (in which connection Mr Bova referred specifically to a letter from an MP), the Council referred to the searches of complaints record carried out at review stage. It explained that it only retained complaints files for five years plus the current year, so the information only went back to 2007. Mr Bova's request was for correspondence up to 2 December 2008, so the Council searched the 2007 and 2008 complaints registers and found only one letter on the subject (not that identified by Mr Bova). The Council explained that it had sent this information to Mr Bova, in case it had not been included in any of its previous disclosures. It pointed out that the relevant Service usually drafted the complaint response on behalf of the Chief Executive: any copy held by the Service would have been discovered and disclosed with the Council's initial response.
33. During the investigation, the MP's letter was located on a memory stick of a former member of staff, which was only discovered at that point. The letter was copied to Mr Bova. The Council confirmed that a search of the memory stick had disclosed nothing else of relevance.
34. In relation to the other points raised by Mr Bova, the Council explained that the information was either contained on the publicly available case file or did not exist. If the information were held, it would have been identified in the searches described above or through inspection of the case file.
35. On review of the searches now carried out and the explanations provided by the Council, the Commissioner is satisfied that the Council has taken adequate steps to identify and locate all the information held and falling within the scope of Mr Bova's request. In reaching this conclusion, she considered the evidence of the extent of the searches conducted by the Council, the age of the information in question, those within the Council who have been consulted on the information held, the explanations provided by the Council as to why information is not held and the extent to which information has already been provided.
36. On the balance of probabilities, therefore, the Commissioner is satisfied that the Council has now identified, located and provided all of the information it holds and which falls within scope of Mr Bova's request.
37. However, in the circumstances, the Commissioner must also conclude that the Council did not identify, locate and provide all of the relevant information until after her investigation commenced. Consequently, she must conclude that the Council failed to comply with regulation 5(1) of the EIRs in responding to Mr Bova's request.



38. In reaching the above conclusions, the Commissioner would reiterate that her investigation has been confined, necessarily, to her remit under the legislation she enforces. While she appreciates that these are issues of concern to Mr Bova, she cannot comment on what information the Council should have held at the material time, what information the Council should decide to retain, or how long any particular information should be retained by the Council.

DECISION

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

By failing to provide all the information it held and which fell within the scope of Mr Bova's request, the Council failed to deal with the request fully in accordance with regulation 5(1) of the EIRs.

As she is satisfied that the Council has now provided Mr Bova with all the relevant information it holds, the Commissioner does not require the Council to take any action.

Appeal

Should either Mr Bova or Highland 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
27 February 2014



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

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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.

...