

Decision Notice



Decision 073/2013 Mrs Carmela Stornaiuolo and City of Edinburgh Council

Statutory notice information

Reference No: 201300564
Decision Date: 22 April 2013

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Rosemary Agnew
Scottish Information Commissioner

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Summary

On 14 April 2012, Mrs Stornaiuolo asked City of Edinburgh Council (the Council) for information about works carried out under a statutory notice. Mrs Stornaiuolo was not satisfied that she had received all of the information she was looking for. Following an investigation, the Commissioner found that the Council had failed to provide all of the relevant information it held when dealing with Mrs Stornaiuolo's request. By the end of the investigation, she was satisfied that this had been done. She also identified technical failures in the Council's handling of the request.

Relevant statutory provisions and other sources

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)

Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a) and (c) of "environmental information"); 5(1) and (2)(a) (Duty to make available environmental information on request); 16(1) and (4) (Review by Scottish public authority)

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 12 April 2012, Mrs Stornaiuolo wrote to the Council and, in relation to a specific statutory notice, requested the following information:
 - a) dilapidation photographs of the areas worked on;
 - b) officer's detailed reports on the areas condemned;
 - c) the record of the cores taken from the stone;
 - d) details of the engineers consulted on the works;
 - e) all notices issued and justification for those notices (reports, etc.);
 - f) dates of erection and dismantling of the scaffolding;



- g) dates of commencement and completion of works, plus the number of days taken to carry out the works;
 - h) the frequency of site visits by private surveyor;
 - i) how Council officials controlled costs on site;
 - j) confirmation as to whether item A38 (additional scaffolding) was used on contract for any building;
 - k) the original bill of quantities and the new higher bill of quantities (for comparison and checking of work) and
 - l) a copy of all the site instructions issued for additional works.
2. The Council responded on 25 June 2012, enclosing some of the information Mrs Stornaiuolo had requested. It stated that it did not hold information falling within the scope of parts b), c) and d) of her request.
 3. On 19 July 2012, Mrs Stornaiuolo wrote to the Council and acknowledged the information provided. She asked for a review on the basis that she did not believe she had been provided with all the information requested.
 4. The Council notified Mrs Stornaiuolo of the outcome of its review on 18 September 2012. It provided Mrs Stornaiuolo with further explanation regarding parts e) and h) of the request. Otherwise, it upheld the original response.
 5. Following further correspondence with the Council, Mrs Stornaiuolo wrote to the Commissioner on 22 February 2013. She stated that she was dissatisfied with the outcome of the Council's review and 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 certain specified modifications.
 6. The application was validated by establishing that Mrs Stornaiuolo 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. On 14 March 2013, the investigating officer notified the Council in writing that an application had been received from Mrs Stornaiuolo. As required by section 49(3)(a) of FOISA, the Council was given an opportunity to provide comments on Mrs Stornaiuolo's application. In particular, it was asked to justify its reliance on any provisions of FOISA and the EIRs it considered applicable to the information requested, and to describe the steps it had taken to identify and locate the requested information.



8. The Council responded on 3 April 2013. It informed the Commissioner that it considered the request to be for environmental information and that it should therefore be dealt with in terms of the EIRs. In this connection, it applied the exemption in section 39(2) of FOISA (see below). It provided details of the searches carried out in response to Mrs Stornaiuolo's request.
9. While noting Mrs Stornaiuolo's concerns regarding the final cost of the repairs carried out, the Commissioner can only consider any submissions which are relevant to her request for information as outlined above. Specifically, her application to the Commissioner relates to the quality of the information provided in response to part a) of her request and her belief that the Council must hold further information falling within the scope of parts b), e), g) and i) of the request.
10. During the investigation, the Council provided Mrs Stornaiuolo with further copies of the photographs requested in part a), together with other information falling within the scope of her request. Mrs Stornaiuolo confirmed receipt of the information.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered the information provided and the submissions made to her by both Mrs Stornaiuolo and the Council. She is satisfied that no matter of relevance has been overlooked.

Environmental information

12. It is clear from the Council's correspondence with both Mrs Stornaiuolo 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 concerns statutory repairs to dwelling houses 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).

Section 39(2) of FOISA – environmental information

13. 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. This allows 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 information requested by Mrs Stornaiuolo, given her conclusion that it would be environmental information.



14. 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 disclosing the information under FOISA.

Regulation 5(1) of the EIRs

15. 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. While this duty is subject to certain qualifications, none of them appear to be relevant in this case. 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 an applicant believes the authority should hold (but which is not in fact held at that time).
16. The Council provided submissions in response to the questions put by the investigating officer on this matter. The Council described the searches carried out to establish what relevant information it held. These covered both hard copy and electronic filing systems, including (i) the relevant electronic folders held by the Surveying officer responsible for managing the project in question, (ii) paper files relating to the project and (iii) email archives. Evidence of these searches was provided.
17. During the investigation the Council provided the Commissioner with site notes provided by the contract administrator. These notes make reference to surveys of the site, materials required, etc., and the Council believed they explained why work would not have started on “day 1”. The site notes also contain information regarding the lack of progress on site and a note that the Consultant was to pursue the matter with the Contractor. The Council provided this further information to Mrs Stornaiuolo during the investigation: the Commissioner considers some of it to fall within the scope of parts e) and g) of the request.
18. Having considered the Council’s submissions, the Commissioner is satisfied that, during the investigation, the Council carried out adequate searches with a view to identifying and locating the information requested by Mrs Stornaiuolo. She accepts that by the end of the investigation, Mrs Stornaiuolo had been provided with all of the information held by the Council and falling within the scope of her request.
19. However, the Commissioner also finds that the Council failed to identify, locate and provide all of the relevant information it held when dealing with Mrs Stornaiuolo’s information request and her requirement for review. In this respect, the Council failed to comply with the requirements of regulation 5(1) of the EIRs.

Handling of the request

20. Regulation 5(2)(a) of the EIRs gives Scottish public authorities a maximum of 20 working days after receipt of the request to comply with a request for information, subject to certain exceptions which are not relevant in this case.



21. Given that the Council did not respond to Mrs Stornaiuolo's request of 12 April 2012 until 25 June 2012, the Commissioner finds that the Council failed to comply with the requirements of regulation 5(2)(a) of the EIRs. She notes the Council's apology for this in its submissions to her.
22. Regulation 16(4) of the EIRs gives Scottish public authorities a maximum of 20 working days after the date of receipt of the applicant's representations to notify the applicant of its decision on review. The Commissioner notes that Mrs Stornaiuolo's letter of 19 July 2012 required the Council to review its decision: it was not responded to until 18 September 2012.
23. Given that the Council did not respond to Mrs Stornaiuolo's requirement for review within twenty working days, the Commissioner finds that the Council failed to comply with the requirements of regulation 16(4) of the EIRs. She notes the Council's apology for this in its response to Mrs Stornaiuolo's requirement for review.
24. The Commissioner does not require the Council to take any action regarding the failures identified in this decision. If similar breaches occur in future, the Commissioner may take further action against the Council in line with her enforcement strategy.

DECISION

The Commissioner finds that the Council failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to Mrs Stornaiuolo's information request. She finds that the Council failed to identify, locate and provide Mrs Stornaiuolo with all of the information it held and which fell within the scope of her request, and thereby failed to deal with the request in accordance with regulation 5(1). She also finds that the Council failed to respond to Mrs Stornaiuolo's request and requirement for review within the respective timescales set by regulations 5(2)(a) and 16(4) of the EIRs.

Given the disclosure of the information in the course of the investigation, the Commissioner does not require the Council to take any action in respect of these failures.

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and City of Edinburgh Council



Appeal

Should either Mrs Stornaiuolo or City of Edinburgh 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.

Margaret Keyse
Head of Enforcement
22 April 2013



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.

...



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

...

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.

...

(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.