

Decision Notice

Decision 074/2018: Mr Guy Kerry and Highland Council

Draft meeting minutes and notes

Reference No: 201800125

Decision Date: 30 May 2018



Scottish Information
Commissioner

Summary

The Council was asked for information regarding draft minutes and internal notes and paperwork relating to a specific meeting. The Council withheld the information under the EIRs.

Following investigation, during which the Council disclosed the information previously withheld, the Commissioner found the Council had initially failed to identify all of the information requested and was not entitled to withhold the information that had been identified. However, he was satisfied that, by the end of the investigation, the Council had carried out appropriate searches and disclosed all the relevant information it held.

The Commissioner also found that the Council failed to respond within the timescale set down in the EIRs.

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); 10(1), (2) and (4)(d) (Exceptions from duty to make environmental 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.

Background

1. On 12 December 2017, Mr Kerry made a request for information to Highland Council (the Council). In reference to a specific meeting of 30 March 2017, Mr Kerry requested:

“...the information contained within the draft minutes produced from that meeting and also the council staff's notes of the meeting and the council's internal notes and paperwork which consider that meeting.”

The Council acknowledged receipt of the request on that date.
2. On 16 January 2018, Mr Kerry wrote to the Council requesting a review of its decision, on the basis that it had failed to respond to his request (the response having been due the previous day).
3. The Council notified Mr Kerry of the outcome of its review on 16 January 2018. It advised Mr Kerry that, since it had received his requirement for review earlier that day, the response should be considered as the review outcome. It apologised for not responding within the time allowed.
4. The Council advised Mr Kerry that it had applied section 39(2) of the Freedom of Information (Scotland) Act 2002 (FOISA), as the request was for environmental information and fell to be considered under the EIRs. It explained that it considered the draft minutes held to be unfinished documents and excepted from disclosure under regulation 10(4)(d) of the EIRs. It also applied regulation 11(2) of FOISA, to information it considered to be personal data.

5. On 17 January 2018, Mr Kerry wrote to the Commissioner. He 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.
6. Mr Kerry complained that the Council had failed to respond within the time allowed by the EIRs, and stated he was dissatisfied with the outcome of the Council's review because he disagreed with the exceptions claimed by the Council. Mr Kerry also questioned whether the Council had provided all of the information it held falling within the scope of his request.
7. The Commissioner has noted the Council's failure to respond to Mr Kerry's request timeously, and this may be taken into account in considering whether enforcement action is required in future. The Council recognised this failure, however, and apologised for it when responding to Mr Kerry's requirement for review, so the Commissioner will not consider it further in the context of this decision.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mr Kerry 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.
9. On 21 February 2018, the Council was notified in writing that Mr Kerry had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr Kerry. The Council provided the information and the case was allocated to an investigating officer.
10. Having examined the information withheld from Mr Kerry, it was apparent that the information to which the Council had applied regulation 11(2) of the EIRs did not in fact fall within the scope of Mr Kerry's request. The investigation, therefore, was to consider whether the Council had identified all of the information falling within the scope of the request and whether it had correctly withheld information as excepted under regulation 10(4)(d) of the EIRs.
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, focusing on its application of exceptions and the steps taken to identify and locate any relevant information.
12. The Council responded and advised that it had reconsidered its position and no longer wished to rely upon regulation 10(4)(d) of FOISA to withhold the draft minutes. It provided the draft minutes to Mr Kerry. The Council believed it had now provided Mr Kerry with all of the information it held falling within the scope of his request.
13. Mr Kerry acknowledged receipt of the information provided by the Council. He wished the Commissioner to come to a decision, however, as he believed further information should be held by the Council.

Commissioner's analysis and findings

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

Application of the EIRs

15. The Commissioner is satisfied that any information falling within the scope of the request, which relates to access to land, is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs (the relevant provisions are reproduced in Appendix 1 to this decision). Mr Kerry made no comment on the Council's application of the EIRs in this case and the Commissioner will consider the request in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs – Information held by the Council

16. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) 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 at the time the request is received. This is not necessarily to be equated with information an applicant believes the authority should hold, although the applicant's reasons may be relevant to the investigation of what is actually held.
17. The Commissioner has taken account of the submissions provided by Mr Kerry, in which he provides reasons why he considers the Council should hold further information falling within the scope of his request, and in particular internal notes and paperwork. While Mr Kerry may have genuine reasons for believing that the Council should hold further information, the Commissioner can only consider whether or not the Council identified the information it actually held.
18. In its submissions to the Commissioner, the Council confirmed the searches and enquiries it undertook to ascertain what information it held falling within the scope of Mr Kerry's request. The Council explained that the officer who had been in attendance at the meeting and had created the initial draft minute had confirmed that, whilst notes were taken during the meeting, those notes were destroyed following the creation of the draft minutes.
19. The Council referred the Commissioner to submissions that it had made in relation to another application, which had resulted in the Commissioner issuing *Decision 038/2018 Mr Guy Kerry and Highland Council*¹. This related to an earlier request made by Mr Kerry, on 22 May 2017, and the Council explained that the information under consideration here also fell within the scope of that earlier request. Following *Decision 038/2018*, the Council provided Mr Kerry with information on 4 May 2018.
20. The Commissioner notes that some of the information disclosed to Mr Kerry on 4 May 2018, fell within the scope of his request of 12 December 2017, under consideration here. It had not, however, been identified as relevant in the context of this request.
21. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.
22. In this case, the Council had the opportunity to find the information disclosed on 4 May when dealing with the 22 May 2017 request and when dealing with the request under consideration here. Clearly there were inadequacies in its handling of both requests, which led to the

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2018/201702100.aspx>

information not being provided until it was. By failing to identify, locate and provide the information at the time it dealt with Mr Kerry's request of 12 December 2017, the Commissioner finds that Council failed to comply with regulation 5(1) of the EIRs.

23. That said, the Commissioner is satisfied that Mr Kerry has now been supplied with all information held by the Council and falling within the scope of his request of 12 December 2017. The information supplied to Mr Kerry on 4 May – insofar as falling within the scope of this request – is routine administrative correspondence and a degree of confusion is perhaps understandable in the face of overlapping requests. On balance, the Commissioner is satisfied, having considered all relevant submissions and what has been identified and disclosed, that it would be reasonable to conclude that the Council holds no further information covered by the 12 December 2017 request.
24. As a result, the Commissioner must find that in dealing with Mr Kerry's request of 12 December 2017, the Council failed to identify and locate all of the information it held and which fell within the scope of his request. Given that any relevant information has now been disclosed to Mr Kerry, the Commissioner does not require the Council to take any action.
25. The Commissioner cannot comment further on the Council's compliance with Decision 038/2018, which is still under active consideration.

Regulation 10(4)(d) – Information in the course of completion

26. As mentioned above, the Council withdrew its reliance on regulation 10(4)(d) during the investigation. In the absence of submissions from the Council, the Commissioner must conclude that the information in question was not excepted from disclosure under regulation 10(4)(d) of the EIRs and was therefore incorrectly withheld by the Council. By doing so, the Council breached regulation 5(1) of the EIRs.
27. Given that the information concerned was provided to Mr Kerry during the investigation, the Commissioner does not require the Council to take any action.

Decision

The Commissioner finds that Highland Council (the Council) failed to comply the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Kerry.

The Commissioner finds that the Council failed to comply with regulation 5(1) of the EIRs, by failing to identify, locate and provide all of the information it held and by incorrectly withholding information under regulation 10(4)(d) of the EIRs. The Commissioner does not require the Council to take any action in respect of these failures, in response to Mr Kerry's application, given that he is satisfied that the relevant information has now been disclosed to Mr Kerry.

Appeal

Should either Mr Kerry 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

30 May 2018

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.

...

10 Exceptions from duty to make environmental information available-

(1) A Scottish public authority may refuse a request to make environmental information available if-

(a) there is an exception to disclosure under paragraphs (4) or (5); and

(b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

(2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-

(a) interpret those paragraphs in a restrictive way; and

(b) apply a presumption in favour of disclosure.

...

(4) A Scottish public authority may refuse to make environmental information available to the extent that

...

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or

...

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