

Decision Notice



Decision 084/2012 Lee Kindness and the City of Edinburgh Council

GIS download of core path data

Reference No: 201101566
Decision Date: 11 May 2012

www.itspublicknowledge.info

Rosemary Agnew
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr Kindness requested from the City of Edinburgh Council (the Council) information relating to the Edinburgh Core Path Plan in two distinct electronic formats. The Council responded by providing a weblink allowing a download of one of the requested formats. In relation to the other requested format, the Council advised Mr Kindness that it was not required to comply with the request by virtue of regulation 6(1) of the EIRs. Following a review, Mr Kindness remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mr Kindness' request for information by refusing to provide the information in one of the formats specified by Mr Kindness in terms of regulation 6(1)(b) of the EIRs. However, the Commissioner found that the Council had failed to comply with the timescale specified in regulation 16(4) of the EIRs in dealing with Mr Kindness' requirement for review. She did not require the Council to take any action.

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) (Interpretation) (definitions (a), (b) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make environmental information available); 6(1) (Form and format of information); 16(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 22 February 2011, Mr Kindness emailed the Council via the whatdotheyknow website¹ requesting the following information:
 - 1) A copy of the complete Edinburgh Core Paths Plan in pdf format.

¹ <http://www.whatdotheyknow.com/>



- 2) A download from the Council's Geographic Information System(s) of the Core Path Routes. Mr Kindness stated that he preferred to receive this information by electronic means and in a machine readable format, such as the ESRI shapefile or similar vector data format appropriate for use within GIS software.
2. The Council responded on 9 March 2011, advising Mr Kindness that his request had been dealt with in terms of the EIRs. The Council advised Mr Kindness that the information he was seeking was available on its website, and provided a link to the relevant webpage. The Council also advised Mr Kindness that, given that the information was already publicly available and was easily accessible, the information was excepted from disclosure under "regulation 6" of the EIRs. The Commissioner understands this to refer to regulation 6(1)(b) of the EIRs. The Council did not differentiate between requests 1) and 2) in its response.
3. On 10 March 2011, Mr Kindness emailed the Council requesting a review of its decision in relation to request 2) only. Mr Kindness noted that the Council had complied with request 1) by providing a weblink which allowed him to download the Core Path Routes in pdf format. However, in relation to request 2), he stated that pdf maps were not sufficient for his purpose and he considered that the EIRs should allow access to GIS data.
4. The Council responded on 14 April 2011. The Council upheld its decision that it was not required to comply with request 2) in terms of regulation 6(1) of the EIRs. The Council stated that, under regulation 6(1)(a) of the EIRs, it would not comply with the request, "because it is reasonable that the information you seek is already available in pdf format".
5. On 25 August 2011, Mr Kindness 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 certain specified modifications.
6. The application was validated by establishing that Mr Kindness had made a request for information to a Scottish public authority and had 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 subsequently 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. In particular, the Council was asked whether it wished to apply the exemption in section 39(2) of FOISA to the withheld information on the basis that it comprised environmental information. The Council was also asked to clarify whether it was relying on the provisions of regulation 6(1)(a) or 6(1)(b) of the EIRs in declining to comply with Mr Kindness' request.



8. During the investigation, the Council confirmed that it considered the information to be exempt under section 39(2) of FOISA. The Council also confirmed that it refusing the request in terms of regulation 6(1)(b) of the EIRs.
9. The Council also advised the investigating officer that it did not own the core path shapefiles that were utilised on its website. However, the Council subsequently entered into dialogue with the owner of the shapefiles to ascertain whether the owner would agree to the shapefiles being provided to Mr Kindness.
10. The Council obtained authorisation from the owner of the shapefiles, and these were provided to Mr Kindness on 4 April 2012.
11. The investigating officer subsequently contacted Mr Kindness inviting him to withdraw his application for a decision by the Commissioner in view of the fact that the requested information had now been disclosed to him. However, Mr Kindness declined to withdraw his application and indicated that he still required the Commissioner to issue a decision on his application.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to her by both Mr Kindness and the Council and is satisfied that no matter of relevance has been overlooked.

Handling in terms of the EIRs

13. In its initial response to Mr Kindness, the Council stated that it was handling the request under the EIRs. In subsequent correspondence with the investigating officer, the Council confirmed that it considered the information to be exempt from disclosure in terms of section 39(2) of FOISA.
14. The Commissioner agrees with the Council that the information sought by Mr Kindness is environmental information. The purpose of core paths is to provide a network of routes sufficient for the purposes of giving the public reasonable access throughout an area. The Commissioner considers that information on this topic would therefore concern measures such as plans or programmes likely to affect the elements of the environment including soil, land and landscape and natural sites or factors that affect these elements, such as substances, noise and waste. In the circumstances, therefore, the Commissioner considers that the information requested by Mr Kindness falls within the definition of environmental information set out in regulation 2(1), in particular part (c) of that definition insofar as it relates to plans and programmes.



Section 39(2) of FOISA – environmental information

15. The exemption in section 39(2) of FOISA provides 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.
16. As noted above, the Commissioner agrees that the information under consideration is environmental information and she accepts that the Council was entitled to apply the exemption to the withheld information.
17. This exemption 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 the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exemption, and in dealing with the request in line with the requirements of the EIRs, outweighs any public interest in disclosure of the information under FOISA. The Commissioner has therefore proceeded to consider this case in what follows solely in terms of the EIRs

Regulation 6(1)(b) of the EIRs

18. Regulation 6(1)(b) of the EIRs states that, where an applicant requests that information is made available in a particular form or format, a Scottish public authority shall comply with that request unless the information is already publicly available and easily accessible to the applicant in another form or format. As noted above, in the Council's view, the information was publicly available in pdf format on its website and was easily accessible.
19. In order to determine whether the Council dealt with Mr Kindness' request correctly, the Commissioner must be satisfied as to whether, at the time it responded to the request, the information held by the Council (and which fell within the scope of the request) was both publicly available and easily accessible to Mr Kindness in another form or format.
20. In this case, the Commissioner is satisfied that the information was publicly available on the Council's website and was easily accessible to Mr Kindness in pdf format at the time the Council responded to his request.
21. Mr Kindness had requested that the information be provided in a specific format. However, whilst the Commissioner notes Mr Kindness's wish for the information to be provided in that specific format, this is not a consideration that can be taken into account in determining whether or not regulation 6(1)(b) is applicable.
22. The Commissioner therefore considers that the Council was entitled to apply regulation 6(1)(b) of the EIRs to the information and, therefore, that the Council was not required to make the information available in the form and format requested by Mr Kindness.

Timescales for compliance

23. In his application to the Commissioner, Mr Kindness noted that the Council had breached the timescale for responding to his requirement for review.



24. Regulation 16(4) of the EIRs gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to notify the applicant of its decision. In this case, the Council failed to notify Mr Kindness of the outcome of its review within the prescribed 20 working days and therefore failed to comply with the requirements of section 16(4) of the EIRs.
25. On this occasion, the Commissioner does not require the Council to take any action in relation to this breach in response to this decision.

The INSPIRE (Scotland) Regulations 2009²

26. In his application to the Commissioner, and in subsequent correspondence with the investigating officer, Mr Kindness noted that the requested information may come within the scope of the INSPIRE (Scotland) Regulations 2009 (the INSPIRE Regulations) and asked the Commissioner for a view on the applicability of the INSPIRE Regulations to this and similar requests.
27. By way of background, the INSPIRE Regulations came into force on 31 December 2009 and apply to Scottish public authorities and certain third parties. They aim to make available consistent spatial datasets about the environment and to create services for public access of those datasets and bring into effect Directive 2007/2/EC which established an Infrastructure for Spatial Information in the European Community
28. The Commissioner notes that, at the time of Mr Kindness' request (22 February 2010), there was no requirement in terms of the INSPIRE Regulations for Scottish public authorities to make download services of the type sought by him publicly available and that the Council had not proactively made the download service available.
29. Article 4 of Commission Regulation (EC) No. 976/2009 of 19 October 2009 (as amended), which implements Directive 2007/2/EC, provides that download services are to be fully established by 28 December 2012 for datasets that are newly created or extensively modified.
30. In the Commissioner's view, as the Council was under no obligation to have made the download service available at the time of the request, it was under no obligation to consider Mr Kindness' request in terms of the INSPIRE Regulations. Accordingly, as no duty existed, she is satisfied that there was no breach of the INSPIRE Regulations by the Council.

² <http://www.legislation.gov.uk/ssi/2009/440/contents/made>



DECISION

The Commissioner finds that the City of Edinburgh Council (the Council) was entitled to apply regulation 6(1)(b) of the Environmental Information (Scotland) Regulations 2004 (the EIRs) to the information requested by Mr Kindness; in so doing, the Council complied with the EIRs in responding to his request.

However, the Commissioner finds that the Council failed to comply with the EIRs by failing to respond to Mr Kindness' requirement for review within the timescale laid down in regulation 16(4) of the EIRs. However, the Commissioner does not require the Council to take any action in respect of this failure in response to this decision.

Appeal

Should either Mr Kindness or the 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 notice.

Margaret Keyse
Head of Enforcement
11 May 2012



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

-

- (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;

...

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)-

...

(b) is subject to regulations 6 to 12.

...



6 Form and format of information

- (1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-
 - (a) it is reasonable for it to make the information available in another form or format; or
 - (b) the information is already publicly available and easily accessible to the applicant in another form or format.

...

16 Review by Scottish public authority

...

- (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.

...