

Decision Notice



Decision 085/2009 Mr David Jamieson and the City of Edinburgh Council

Public consultation responses

Reference No: 200900143
Decision Date: 23 July 2009

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Kevin Dunion
Scottish Information Commissioner

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Summary

Mr Jamieson requested from the City of Edinburgh Council (the Council) a copy of the public consultation responses on its proposals for Lower Granton Road. The Council responded by informing Mr Jamieson that the information he sought was excepted under regulation 10(4)(d) of the Environmental Information (Scotland) Regulations 2004 (EIRs), as material which was still in the course of completion. Following a review, Mr Jamieson remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had failed to deal with Mr Jamieson's request for information in accordance with the EIRs by incorrectly applying regulation 10(4)(d) to the information withheld. As the Council released the information during the course of the investigation he did not require it to take any action.

Relevant statutory provisions and other sources

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 5(1) and (2)(b) (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 the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 20 November 2008, Mr Jamieson wrote to the Council requesting a copy of all responses to a public consultation exercise carried out in relation to its proposals for Lower Granton Road, Edinburgh.
2. The Council responded on 19 December 2008. The Council explained that it was handling his request in accordance with the EIRs. It informed Mr Jamieson that a report on the Lower Granton Road proposals (which would include details of the public consultation exercise) was being scheduled for the meeting of its Transport, Infrastructure and Environment Committee expected to take place on 5 May 2009. Until that report had been prepared, the Council considered the information he was seeking, being material still in the course of completion, to be exempt under regulation 10(4)(d) of the EIRs.



3. On 21 December 2008, Mr Jamieson wrote to the Council requesting a review of its decision. In particular, Mr Jamieson believed that the Council had misinterpreted his request. He clarified that he was seeking copies of the responses to the consultation exercise and not the Council's response to the public comments.
4. The Council notified Mr Jamieson of the outcome of its review on 26 January 2009. The Council upheld its original decision to withhold the information under regulation 10(4)(d), stating that the information in question would be released after the relevant report to Committee had been released into the public domain.
5. On 21 January 2009 Mr Jamieson 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 Jamieson 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.

Investigation

7. On 2 February 2009, the Council was notified in writing that an application had been received from Mr Jamieson and was asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. 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 to justify its reliance on any provisions of the EIRs it considered applicable to the information requested. A submission on the application of regulation 10(4)(d) was provided and will be considered in the Commissioner's analysis and findings below.
9. During the course of the investigation (following publication of the relevant Committee report) the Council released the consultation responses to Mr Jamieson, subject to the redaction of personal data. However, Mr Jamieson wished to continue with his application to the Commissioner as he believed the Council should have released the material in response to his request. Mr Jamieson also clarified that he was not concerned about the personal information that had been redacted.



Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has consider all of the withheld information and the submissions made to him by both Mr Jamieson and the Council and is satisfied that no matter of relevance has been overlooked.
11. As required by section 47(1) of FOISA, the Commissioner has considered the Council's response to Mr Jamieson in the circumstances applying at the time of his request for review.

Regulation 10(4)(d)

12. Regulation 10(4)(d) of the EIRs provides an exception from the duty to make environmental information available where the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data. The exception is subject to the public interest test regulation 10(1) of the EIRs.
13. In this case and others which consider the application of regulation 10(4)(d) of the EIRs, the Commissioner has considered the relevant paragraphs of *The Aarhus Convention: an implementation guide* (<http://www.unece.org/env/pp/acig.pdf>) for guidance on the application of exception in regulation 10(4)(d). During the course of the investigation, the Council was asked to consider the Commissioner's previous decisions on the application of regulation 10(4)(d), which conveyed his interpretation of this regulation.
14. This guide (at page 58) indicates that the mere status of something as a draft does not automatically bring it under the exception: other articles of the Convention require public access to certain drafts. It goes on to suggest that the term "materials in the course of completion" refers to individual documents that are actively being worked on by the public authority, or will have more work done on them within a reasonable time-frame. Once these documents are no longer in the "course of completion" they may be released, even if they are still unfinished and *even if the decision to which they pertain has not yet been resolved*.
15. The Council advised that it considered it of significance that regulation 10(4)(d) did not refer to the request being *for* material still in the course of completion etc, but rather to the request *relating to* material still in the course of completion. The Council considered the use of this terminology to mean that for a document to be excepted it does not in itself require to be a document still in the course of completion, but simply to be *related* to such material. As the report to Committee had not been finalised at the time the request was made (and indeed still had not been at the time of Mr Jamieson's application), the Council submitted that the consultation responses *related to* material still in the course of completion, to unfinished documents or to incomplete data.



16. The Commissioner does not accept the interpretation of regulation 10(4)(d) put forward by the Council. Specifically, he is satisfied that the correct interpretation and intention of regulation 10(4)(d) is to except information which is itself still in the course of the completion etc, rather than information which *relates* to such material. On any reasonable interpretation of the terms of the exception, the question is what the *request* relates to (i.e. the information requested), not what that information may relate to.
17. In coming to this view of the exception in regulation 10(4)(d), the Commissioner has taken account of regulation 10(2), which states that in considering the application of the exception, the public authority shall interpret the exception in a narrow way and apply a presumption in favour of disclosure.
18. The Council has not in fact argued that the information in the consultation responses was (at the relevant time) material still in the course of completion, unfinished documents or incomplete data. Having considered the information, the Commissioner sees no basis for doing so and therefore concludes that it does not fall within any part of the exception contained in regulation 10(4)(d). As he is satisfied that the exception does not apply, he is not required to consider the public interest test.
19. As no other exception was applied by the Council at the time of Mr Jamieson's request for review, the Commissioner concludes that the Council was incorrect in withholding the information sought by Mr Jamieson.

DECISION

The Commissioner finds that the Council failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Jamieson. The Commissioner finds in particular that the Council was incorrect in its application of regulation 10(4)(d) of the EIRs to the information withheld.

Given that that the Council has now released the consultation responses to Mr Jamieson, the Commissioner does not require the Council to take any action in respect of this failure in response to this particular.

Appeal

Should either Mr Jamieson or the 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.

Decision 085/2009
Mr David Jamieson
and City of Edinburgh Council



Margaret Keyse
Head of Enforcement
23 July 2009



Appendix

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

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.

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;
...