

Decision Notice



Decision 090/2013 Mr Ian Millar and the City of Edinburgh Council

Statutory repair notices

Reference No: 201201432
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Rosemary Agnew
Scottish Information Commissioner

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



Summary

On 16 May 2012, Mr Millar asked the City of Edinburgh Council (the Council) for information regarding repairs undertaken in response to a statutory notice. Following a review, the Council provided some information. Other information was withheld on the basis that its disclosure would (or would be likely to) prejudice substantially the course of justice or the conduct of criminal or disciplinary investigations. Following an investigation, the Commissioner accepted the Council's arguments to this effect in part only: she required disclosure of the remaining information. She also found that the Council had failed to respond to Mr Millar's request within the required timescale.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a) and (c) of "environmental information"); 5(1) and (2) (Duty to make available environmental information on request); 10(1), (2) and (5)(b) (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 16 May 2012, Mr Millar wrote to the Council requesting the following information in respect of Statutory Notices 06/02148/24_R and 09/02582/24_R:
 - 1) Dilapidation photographs of the areas worked on;
 - 2) Officers' detailed reports on the areas condemned;
 - 3) The record of the cores taken from the stone;
 - 4) Details of the engineer consulted on the works;
 - 5) A copy of each statutory notice issued and detailed justification for the notices (reports, photographs etc.);
 - 6) The frequency of site visits by the private surveyor;



- 7) Details of how Council officials controlled costs on site;
 - 8) Confirm whether item A38 additional scaffold was used on the contract for the building;
 - 9) The original bill of quantities and the new higher bill of quantities (for comparison and checking of work);
 - 10) A copy of all the site instructions issued for additional works;
 - 11) The contractual agreement/arrangement under which works were awarded to Stonetec Ltd by the Property Conservation Department;
 - 12) A copy of the Tender Report List for the above works;
 - 13) A copy of all documentation relating to the basis for upward revision of costs from the initial £8,495 to £43,000 per flat;
 - 14) A copy of the survey done on the building on 20th July 2011 by Deloitte.
2. Mr Millar received no response to his request for information and, on 18 June 2012, wrote to the Council requesting a review in respect of its failure to respond.
 3. The Council responded on 18 July 2012. It provided information in response to parts 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of Mr Millar's request. Personal data were redacted under regulation 11(2) of the EIRs.
 4. The Council also stated that it was unable to provide information in respect of part 3 of the request, as no core stone samples had been taken and therefore no information was held. In respect of part 14 of Mr Millar's request, the Council stated that it wished to rely on regulation 10(5)(b) of the EIRs (substantial prejudice to the course of justice etc.).
 5. On 25 July 2012, Mr Millar 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. Mr Millar gave the following reasons for his dissatisfaction with the outcome of the Council's review:
 - Part 1 – he was of the view that the photographs provided did not show why the original statutory notice (SN) was issued.
 - Parts 2 and 5 – he was of the view that the information provided did not explain why the original SN was issued, or why the scope of the SN works increased from £8,495 to £43,000 per flat.
 - Part 7 – he was of the view that the information provided did not explain how the Council had kept costs in check to provide best value for owners.



- Part 13 – he was of the view that the information provided did not explain the basis for increasing the scope of the works or the costs.
 - Part 14 – he was of the view that the Council should have provided him with a copy of a survey done by Deloitte LLP on his building. He emphasised that he was not asking for a copy of the full Deloitte Report, but only for a copy of a survey carried out by Deloitte on his property on 20 July 2011.
 - Timescales – he was unhappy with the length of time taken by the Council to deal with his initial request.
7. The application was validated by establishing that Mr Millar 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.

Investigation

8. On 26 July 2012, the Council was notified in writing that an application had been received from Mr Millar. It was asked to provide the Commissioner with the information withheld from him. The Council responded with the information requested and the case was allocated to an investigating officer.
9. 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). In particular, the Council was asked to:
- a. explain the steps it had taken to identify and locate the information requested by Mr Millar;
 - b. justify its reliance on regulation 10(5)(b) of FOISA;
 - c. explain why it failed to respond to the request on time.
10. Later during the investigation, the Council was asked to carry out further searches to determine whether it might hold any further information not already supplied to Mr Millar.
11. The Council found no further information apart from a CD containing photographs of the building. These photographs were found to be photographs taken by Mr Millar himself, along with another homeowner, with copies having been provided to the Council by Mr Millar at an earlier date.
12. The Council provided the Commissioner with a copy of an investigation report by Deloitte LLP, containing details of an inspection of the property carried out on the date specified in Mr Millar's request. It stated that this was the only information it held which might fall within the scope of part 14 of Mr Millar's request. While Mr Millar referred to a survey rather than an inspection in his request, the Commissioner considers it reasonable in the circumstances to conclude that this is the information he had in mind when framing part 14 of his request.



13. The Commissioner asked the Council if it wished to provide updated submissions as to why the specific inspection information (as opposed to the whole report) should be withheld.
14. The Council submitted that it wished to withhold all of the inspection information under regulation 10(5)(b) of the EIRs.
15. Mr Millar was also asked for his submissions, which he provided.
16. The relevant submissions received from both the Council and Mr Millar will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

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

Application of the EIRs

18. The Council considered the information requested was environmental information, as defined in regulation 2(1) of the EIRs. The information concerns building repair work under the statutory notice regime, along with the condition of the building in question: and the Commissioner is satisfied that it falls within either paragraph (a) or paragraph (c) of the definition of environmental information contained in regulation 2(1) of the EIRs, being information on the state of the elements of the environment, or on measures and activities affecting or likely to affect the state of those elements.

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

19. The Commissioner must consider whether the Council has provided Mr Millar with all of the information it holds and which falls within the scope of parts 1, 2, 5, 7 and 13 of his request.
20. In locating the information provided to Mr Millar when responding to his request for review, the Council explained that it had carried out a thorough search of all paper and electronic files. The two dedicated paper files held for this project were both extensively searched and reviewed. The shared network drives for any documents relating to Mr Millar's address were also checked, along with the electronic records of the Property Conservation officer who looked after the project. The Council also requested and then reviewed all the information held by the job consultants.
21. The Commissioner asked the Council to carry out further searches to ensure that no other information falling within the scope of parts 1, 2, 5, 7 and 13 of the request had been overlooked.



22. On carrying out a further search, the Council found some photographs which it provided to Mr Millar, but which transpired to be photographs Mr Millar himself had provided to the Council at an earlier date (as noted at paragraph 11 above). Therefore, it was information already held by Mr Millar.
23. The Council submitted that no other information was held which would shed any further light on why the statutory notice was issued. It stated that no officer reports had been produced for this purpose. The Council went on to confirm that nothing additional had been found in either the electronic or hard copy files, and that all relevant newsletters had been released along with emails detailing site visits. The Council also submitted that, as Council staff did not directly manage the project, it would not normally expect to hold any documentation proving how its staff controlled costs.
24. The Commissioner is satisfied that the Council conducted adequate and proportionate searches in the circumstances. As a result, it identified and located all relevant information it held, which was then provided to Mr Millar. It is not within the Commissioner's remit to reach a decision as to whether the Council *should* hold documentation justifying the increasing costs of the repairs to the owners. Her remit is restricted to determining whether the Council actually *does* (or did, at the time it dealt with the request) hold any such information.

Regulation 10(5)(b) of the EIRs

25. Regulation 10(5)(b) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature.
26. The information being withheld under regulation 10(5)(b) of the EIRs consists of the inspection information relating to Mr Millar's building contained in a report by Deloitte LLP. The relevant paragraphs of the report are as follows: 2.8 – 2.10; 3.1; 3.49 – 3.53; 4.17 – 4.18 and 5.4.
27. The Council submitted that it was withholding the inspection information because there were various ongoing investigations into the handling of statutory repair notices. In the circumstances, it believed that the release of the information would, or would be likely to, prejudice substantially the outcome of such investigations, including any subsequent appeal proceedings.
28. It was the view of the Council that the inspection information should be considered as a single piece of information, in the context of the whole report, and that regulation 10(5)(b) should be applied to all of the withheld information. The Council submitted that parts of the information could not be considered in isolation and that it must take the inspection information to be part of the whole when considering the potential effects on the course of justice.



29. In scrutinising the content of the withheld inspection information, the Commissioner notes that certain paragraphs simply record how the inspection was carried out and technical information on the inspection and its outcome (paragraphs 2.8, 2.9, 2.10, 3.1, 3.49, 3.50, 3.53 (including the photographs at appendix 2) and 4.18). On the basis of the generic arguments put forward by the Council, the Commissioner cannot understand why disclosure of the information in these particular paragraphs would, or would be likely to, substantially prejudice any investigations.
30. The Commissioner does not accept that exceptions/exemptions should be applied to information in blanket fashion and expects public authorities to look at the component content of information being withheld, and to provide reasons why any particular exception/exemption should be applied to particular elements of the information.
31. As the Council has not sufficiently justified its application of regulation 10(5)(b) to the above-mentioned parts of the information, the Commissioner must find that regulation 10(5)(b) of FOISA does not apply to them. She therefore requires the Council to disclose this information to Mr Millar.
32. In relation to the remaining information (paragraphs 3.51, 3.52, 4.17 and 5.4), the Commissioner accepts that disclosure of this information could impact upon ongoing disciplinary or criminal investigations, to the extent of making substantial prejudice likely. She therefore accepts that the Council was correct in its application of regulation 10(5)(b) to this information.

Public interest test

33. Having found that the Council correctly applied the exception in regulation 10(5)(b) to this information, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs.
34. The test specifies that a public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.
35. Mr Millar, as spokesperson for the owners in his building, explained that he felt the Council had denied those owners the knowledge of, and therefore the right to challenge the legitimacy of, its actions in completing an extensive repair at the front of their building. Mr Millar stated that the owners would like to establish whether Deloitte had anything to say in their report about the need for such an extensive repair, the quality of the repair work and the reliability and validity of the Council's repair assessment and costing practices.
36. The Council acknowledged a public interest in the manner in which statutory repair notices were issued, and public concern about the investigations. It accepted that the system should be open and transparent. However, the Council considered it contrary to the public interest to disclose the information at this time. It believed the public interest would be better served by enabling the relevant proceedings to take their course without potential prejudice.



37. The Council considered that protecting the right of an accused to a fair trial, and to a fair and confidential internal disciplinary investigation and hearing, were arguments that supported maintaining the exception in this case. The Council considered it contrary to the public interest to disclose the information prior to the criminal and internal disciplinary procedures being completed.
38. The Commissioner acknowledges that at the time of the Council's review response to Mr Millar (18 July 2012) there were both criminal and civil proceedings ongoing, along with internal disciplinary proceedings. The Commissioner is required to consider the position as at this date.
39. The Commissioner recognises that the Council is in the process of investigating and addressing serious concerns raised in relation to its Property Conservation service, regarding the statutory notice process and associated works. She is aware that this presents significant challenges for the Council, as individuals affected by these works raise concerns about works on their own properties.
40. The Commissioner also acknowledges that the concern surrounding the statutory repair process in Edinburgh has been shared by the wider public. Disclosure of some of the withheld information could possibly shed light on the issues raised by the owners.
41. However, the Commissioner has to weigh the public interest favouring disclosure against that favouring the maintenance of the exception in regulation 10(5)(b).
42. The Commissioner accepts that where complaints arise about the way in which work has been done by the Council or contractors acting on its behalf, there is a public interest in the Council being able to carry out comprehensive, balanced and robust investigations into those complaints. It is important to ensure that complaints are thoroughly examined and suitable conclusions are reached about the way in which public resources are used. This interest should be considered in the context of the timing of the investigations and of the particular facts of the case.
43. Where investigations involve consideration of staff conduct, there is also a significant public interest in ensuring that individuals whose actions are under scrutiny are treated with fairness and dignity. Identification of individuals who have been suspended, or whose actions are under investigation, could prompt speculation about the actions of those individuals prior to any investigation being concluded, or formal action being taken. There is also a significant public interest in the investigation bodies being able to complete their investigations independently and objectively.
44. The Commissioner accepts that disclosure of the information withheld from Mr Millar could contribute to the identification of such individuals, or speculation about their actions.
45. On balance, having weighed up the arguments advanced by Mr Millar and the Council, the Commissioner finds that in all the circumstances of the case, the public interest in making the withheld information available to Mr Millar is outweighed by that in maintaining the exception in regulation 10(5)(b) of the EIRs.



46. The Commissioner therefore finds that the Council was correct in its application of the exception at regulation 10(5)(b) of the EIRs to the remaining paragraphs of the withheld inspection information.

Timescales

47. Regulation 5(2)(a) of the EIRs specifies that the duty to provide information in response to a request 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.
48. In its submissions, the Council acknowledged that it had failed to provide a response to Mr Millar within the required timescale. It explained that this was due to the high volume of requests for information about statutory notices. It confirmed that it had taken steps to ensure that requests were dealt with timeously in future.
49. Since the Council did not provide a response to Mr Millar's request for information within 20 working days, the Commissioner finds that it failed to comply with regulation 5(2)(a) of the EIRs.
50. Given that the Council provided a response to Mr Millar's requirement for review, the Commissioner does not require the Council to take any further action in relation to this breach, in response to Mr Millar's application.

DECISION

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

The Commissioner finds that the Council was entitled to withhold some of the information on the basis of the exception in regulation 10(5)(b) of the EIRs.

The Commissioner finds that the Council was not entitled to withhold the remainder of the information on the basis of the exception in regulation 10(5)(b) of the EIRs. By failing to provide Mr Millar with that information, and by failing to respond to Mr Millar's request within 20 working days, the Council breached regulation 5(1) of the EIRs.

The Commissioner requires the Council to provide the specified information to Mr Millar (see paragraph 29 of this decision), by 28 June 2013.

Decision 090/2013
Mr Ian Millar
and the City of Edinburgh Council



Appeal

Should either Mr Millar 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
13 May 2013



Appendix

Relevant statutory provisions

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.

...

- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

...

- (b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;

...