

Decision Notice

Decision 090/2016: Mr David Telford and North Ayrshire Council

Section 75 planning agreement

Reference No: 201600207

Decision Date: 26 April 2016



Scottish Information
Commissioner

Summary

Mr Telford requested from North Ayrshire Council (the Council) a copy of a Section 75 Agreement relating to a policy in the local development plan. The Council dealt with the request under the EIRs and refused to provide the information on the basis that (as it was available for a fee from Registers of Scotland) it was already publicly available and easily accessible. Following a review, Mr Telford remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had dealt with Mr Telford's request for information in accordance the EIRs, by refusing to provide the information in terms of regulation 6(1)(b) of EIRs. She did not require the Council to take any action.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b) and (c) of definition of "environmental information"); 5(1) and 2(b) (Duty to make available environmental information on request); 6(1)(b) (Form and format of information)

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 9 December 2015, Mr Telford made a request for information to the Council. The information requested was:
... a full and unredacted copy of the Section 75 Agreement pertaining to Policy RES3 of North Ayrshire Council's current local development plan that has now been signed and formally lodged with the Registers of Scotland.
2. The Council responded on 5 January 2016. It withheld the information under regulation 6(1)(b) of the EIRS, on the grounds that it was already publicly available and easily accessible from the Keeper of the Registers of Scotland (RoS)
3. On 6 January 2016, Mr Telford wrote to the Council, requiring a review of its decision on the basis that RoS would make a charge for providing the information (which he described as significant) and he believed the information should be provided free of charge by the Council.
4. The Council notified Mr Telford of the outcome of its review on 29 January 2016. It upheld its application of regulation 6(1)(b) of the EIRs.
5. On 2 February 2016, Mr Telford 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. Mr Telford stated he was dissatisfied with the outcome of the Council's review because RoS would charge him "a significant amount" for a copy of the Agreement, whereas he believed it should be provided free of charge.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Telford made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 23 February 2016, the Council was notified in writing that Mr Telford had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr Telford. The Council provided the information and the case was allocated to an investigating officer.
8. 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, with a view to explaining how it had reached the view that the information was publicly available and easily accessible to Mr Telford.
9. The investigating officer also contacted RoS to ascertain how much it would cost to obtain a copy of the Agreement. RoS confirmed that it would cost £16.00 plus VAT (i.e. £19.20 in total). Mr Telford was asked to comment on this and maintained that the cost was unreasonable in the circumstances: his arguments are considered further below.

Commissioner's analysis and findings

10. 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 her by both Mr Telford and the Council. She is satisfied that no matter of relevance has been overlooked.

Environmental information

11. Mr Telford has not challenged the Council's decision that the information he requested was environmental. Considering the subject matter of the request, the Commissioner is satisfied that the information can properly be regarded as environmental information, as defined in paragraph (c) of the definition in regulation 2(1) of the EIRs (reproduced in Appendix 1). The Commissioner will consider Mr Telford's request in what follows solely in terms of the EIRs.

Regulation 6(1)(b) of the EIRs

12. 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.
13. In order to determine whether the Council dealt with Mr Telford's request correctly, therefore, the Commissioner must be satisfied as to whether, at the time it responded to Mr Telford's request and requirement for review, the information held by the Council (and which fell within the scope of the request) was both publicly available and easily accessible to Mr Telford in another form or format.
14. There is no doubt that the information is available to the public, from RoS, and Mr Telford has not suggested otherwise. The sole issue appears to be the cost of obtaining it (£19.20 including VAT), and whether this makes it easily accessible for the purposes of regulation 6(1)(b).

Submissions from the Council

15. The Council submitted that its normal policy is to refuse applications where the information is readily available and accessible to an applicant and is a public document, notwithstanding the fact that a charge will be applied.
16. The Commissioner would caution against applying such a policy without considering the individual circumstances of the request and the applicant. It cannot follow that, in all circumstances, any public document available for a charge will be easily accessible to any applicant. In this case, all the Commissioner can consider is whether, having considered all relevant circumstances as presented to her by Mr Telford, the information was easily accessible to him.

Submissions from Mr Telford

17. Mr Telford (who is a member of his local community council) stated that the community council would not be able to expend the very small grant it is given to pay for information that should be available to it openly from the relevant local authority. He noted that community councillors carry out their duties free of charge and considered it hardly reasonable for them also to be expected to fund the cost of providing the information necessary to undertake their duties out of their own pockets. Mr Telford submitted that the members of his community council should not be expected to pay, as individuals, for the amount of information necessary to monitor the various developments affecting the local environment (which includes the Hunterston Peninsula).
18. Mr Telford went on to state that the Section 75 Agreement he had requested was relative to Council policy RES3 and that this policy was described therein as having "significant community benefit"; therefore, the community council should be able to monitor the legal and financial arrangements associated with it.
19. Mr Telford contended that if the Commissioner found against him in this application that it could establish a precedent, which could make it impossible for community councils to perform their statutory duties.

The Commissioner's conclusions

20. In the Commissioner's view, the request was made by Mr Telford himself and not by or on behalf of the community council. There is nothing in his request or his requirement for review to suggest that the request is made other than by Mr Telford personally, in his own right. In his application to the Commissioner Mr Telford makes his submissions in the first person, stating that the Council was unwilling to provide "me" with the information requested "by me". He notes that he is a community councillor, but there is no suggestion that the request is made on behalf of the community council.
21. Mr Telford has not put forward any arguments as to why he, personally, would find it difficult to obtain the information on cost grounds. There is no reason to believe that this information is other than easily available to him. In addition, while accepting that community councils have limited funds at their disposal, it is difficult to accept that the charge in question would make this particular document other than easily accessible to the community council of which Mr Telford is a member, were that an issue.
22. The Commissioner notes Mr Telford's submissions about the wider implications of accepting the application of regulation 6(1)(b) in this particular case. Strictly speaking, there are none: all the Commissioner is considering here is whether this particular information is easily accessible to this particular applicant, bearing in mind the charge payable for obtaining it.

23. The Commissioner acknowledges that there might well be issues with the application of regulation 6(1)(b) if community councils were routinely inhibited from discharging their functions by charges which were beyond their limited means. However, Mr Telford's submissions in this regard appear to be entirely speculative. His community council may have a legitimate interest in a number of significant developments, but he has not explained why this should mean it has a recurring need for documents which are only available for a charge.
24. Taking all of the above submissions into account, and considering the amount of the fee required to obtain the information from a public source, the Commissioner is satisfied that the information was publicly available and was easily accessible to Mr Telford upon payment of the requisite fee, at the time the Council responded to his request and requirement for review.
25. 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 Telford.

Decision

The Commissioner finds that North Ayrshire Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr Telford.

Appeal

Should either Mr Telford or North Ayrshire 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

26 April 2016

Appendix 1: 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;
- (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-

...

(b) the information is already publicly available and easily accessible to the applicant in another form or format.

...

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