

Decision Notice



Decision 093/2013 Mr James Tulloch and the City of Edinburgh Council

Statutory notice repairs

Reference No: 201202332
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Scottish Information Commissioner

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Summary

On 13 December 2011, Mr Tulloch requested from the City of Edinburgh Council (the Council) information in respect of a statutory notice. The Council initially withheld some of the information and stated that it did not hold the remainder. Following a review, the Council provided information, directed Mr Tulloch to where other information was to be found in the public domain and notified him that it did not hold the majority of the remainder. The Commissioner carried out an investigation and accepted that the Council did not hold the information requested by Mr Tulloch which fell within the scope of his application.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(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) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (4)(a) (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 13 December 2011, Mr Tulloch wrote to the Council requesting the following information in respect of works carried out under a statutory notice at a specified address:
 - Dilapidation photographs of the areas worked on (request 1);
 - Officers' detailed reports on the areas condemned, specifically analysis of repairs to chimneys and options to repair in brick and render or masonry (request 2);
 - The record of the cores taken from the stone (request 3)
 - Details of the engineer consulted on the works (request 4);
 - A copy of all the notices issued and justification for those notices (reports etc) (request 5);



- The frequency of site visits by the private surveyor and by Council surveyors (request 6);
 - Details of how Council officials controlled costs on site (request 7);
 - Confirmation as to whether item A38 additional scaffold was used on the contract for my building (request 8);
 - The original bill of quantities and the most recent bill of quantities (request 9);
 - A copy of all the site instructions issued for additional works (request 10);
 - A copy of comparison costs of renovating chimney stacks in brick and render vs. renovating them in masonry (request 11); and
 - The list of the Council's "approved contractors" in force when the contract was awarded (request 12).
2. On 12 January 2012, the Council explained to Mr Tulloch that it was dealing with his requests under the EIRs, and (in terms of regulation 7) it was extending the time for complying with these requests by up to 20 working days because of the number of points raised.
 3. The Council then responded on 31 January 2012 and explained that section 39(2) of FOISA applied to the requests: that is, the information was environmental information and exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs.
 4. The Council explained that for requests 1, 2, 6, 7, 9 (in part), 10, 11, and 12 the requested information was excepted from disclosure under regulation 10(5)(b) of EIRs because there was an ongoing investigation into the handling of statutory repair notices. It provided reasons why it considered the exception to apply, and why it believed the public interest favoured maintaining that exception.
 5. For requests 3, 4, 8, and 9 (in part), the Council notified Mr Tulloch, in terms of regulation 10(4)(a) of the EIRs, that it did not hold the information and so it was unable to provide the information requested. The Council explained that it had checked its files, both paper and electronic, and was unable to locate the information.
 6. For request 5, the Council provided a copy of the statutory notice, with third party personal data redacted in terms of regulation 11 of the EIRs.
 7. On 25 March 2012, Mr Tulloch wrote to the Council requesting a review of its decision.



8. The Council notified Mr Tulloch of the outcome of its review on 17 May 2012. For requests 1, 6 and 9, the Council provided information. For request 8, the Council provided an explanation. For requests 2, 3, 4, 7, 10, and 11, the Council notified Mr Tulloch that it held no information. For request 12, the Council relied upon regulation 6(1)(b) of the EIRs, as the information was within the “Questions and Answers” report presented to the Council on 14 October 2010. The Council referred Mr Tulloch to its website for Committee papers-on-line and explained how to access the report. For request 5, the Council stated that it had provided a copy of the statutory notice with its previous response, commenting that the schedule section of the notice outlined the works required following a site survey.
9. On 12 November 2012, Mr Tulloch wrote to the Commissioner’s office, 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.
10. The application was validated by establishing that Mr Tulloch made requests 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 those requests.

Investigation

11. On 3 December 2012, the Council was notified in writing that an application had been received from Mr Tulloch and was asked to provide the Commissioner with any information withheld from him. The Council responded with the withheld information and the case was then allocated to an investigating officer.
12. Mr Tulloch confirmed his reasons for dissatisfaction with the outcome of the Council’s review, which focused on his refusal to accept that he had been provided with all of the information the Council held and which fell within the scope of his requests.
13. 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. Given the basis of Mr Tulloch’s application, as outlined above, the Council was asked to explain the steps it had taken to identify and locate the information requested.
14. The relevant submissions received from both the Council and Mr Tulloch will be considered fully in the Commissioner’s analysis and findings below.



Commissioner's analysis and findings

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

FOISA or EIRs?

16. The Council considered the information requested to be environmental information. The information concerned building repair work under the statutory notice regime, 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.

Section 39(2) of FOISA – environmental information

17. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1)) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Council was correct to apply the exemption to the withheld information, given her conclusion that it is properly classified as environmental information.
18. 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 disclosing the information under FOISA.
19. Regulation 5(1) of the EIRs (subject to the qualifications 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 when it receives the request, as opposed to information an applicant believes the authority should hold, but which is not in fact held. It is not the Commissioner's role to determine whether the Council *should* hold the information requested by an applicant (as opposed to whether it *did* hold that information), although reasons why the information should be held may be relevant to investigation of whether it is. Clearly, in any event, she cannot require an authority to create information which it does not hold.
20. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.



Regulation 10(4)(a) of the EIRs

21. Regulation 10(4)(a) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received.
22. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs and information can only be withheld under it if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in making the information available.
23. The Council had advised Mr Tulloch that it did not hold any information falling within the scope of certain requests (see below) and therefore the exception in regulation 10(4)(a) of the EIRs applied to these requests.
24. Mr Tulloch expressed surprise in relation to the Council's claims that it did not hold certain information, in particular detailed reports on the areas condemned. Having consulted a surveyor, he understood this to be standard practice. He also thought it reasonable to assume that the Council did hold such information, as they had sent photographs of some examples of condemned areas and an estimated bill of works/materials. From what evidence, he asked, could the Council have produced the bill of materials, other than detailed reports on the areas condemned.

Request 2

25. Request 2 was for "... officers' detailed reports on the areas condemned, specifically analysis of repairs to chimneys and options to repair in brick and render or masonry."
26. The Council submitted that the officers in its Property Conservation Freedom of Information team carried out extensive searches of both electronic and paper files to look for the information requested. This, it continued, involved searching electronic folders held by the Council surveying officer who was responsible for managing this project. The Council also stated that it searched email archives and reviewed paper files relating to the project. These searches did not reveal any information falling within the scope of the request.
27. Having carrying out these searches, the Council concluded that it did not hold this information.
28. During the investigation, Mr Tulloch provided the investigating officer with a copy of a minute of an owners' meeting with the Council on 13 July 2009. Mr Tulloch highlighted point 4 of the minute, in which the Council officer discussed the various chimney repair options (which related to his request for documentation on which option was ultimately decided upon). This information, Mr Tulloch commented, added weight to the reasonable belief that the Council should hold the requested documents. He also provided the investigating officer with a copy of a letter received after the meeting, highlighting the statement (on page 7) that the contractor was "obliged to carry out dilapidation surveys".



29. In response to a request for further comments, the Council confirmed that it had carried out further investigation and searches but had failed to locate any further information falling within the scope of Mr Tulloch's application.
30. Having considered these submissions, the Commissioner is satisfied that the Council carried out reasonable searches, and that it holds (and held, on receipt of Mr Tulloch's request) no information falling within the scope of the request. She is therefore satisfied that the exception in regulation 10(4)(a) of the EIRs applied to the request.
31. The exception set out in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs. Therefore, a Scottish public authority may only withhold information to which the 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.
32. In this case, the Commissioner is satisfied that the information in question is not held by the Council, and was not held on receipt of Mr Tulloch's request. Consequently, she does not consider there to be any public interest in requiring that the information be made available. The Commissioner therefore concludes that the balance of the public interest in this case favours maintaining the exception in regulation 10(4)(a) of the EIRs.

Request 3

33. Request 3 was for "*The record of the cores taken from the stone.*"
34. The Council confirmed that no core samples were taken from the stoneworks. It explained that core samples were not required. Consequently, it had no record of cores taken from the stone in this case and therefore did not search for the information.
35. Having considered the submission received from the Council, the Commissioner is satisfied with the explanation provided. She accepts, therefore, that the Council holds (and held, on receipt of the request) no information falling within the scope of this request. The Commissioner is therefore satisfied that the exception in regulation 10(4)(a) of the EIRs applied to the request.
36. As in respect of request 2, the Commissioner does not consider there to be any public interest in requiring the Council to make available any information covered by request 3. She accepts that no such information is (or was) held. The Commissioner therefore concludes that, in all the circumstances of this case, the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.

Request 4

37. Request 4 was for "*Details of the engineer consulted on the works.*"
38. The Council informed the Commissioner that no engineer was consulted on this project. Therefore, the Council stated it would have no record of details of the engineer and did not search for this information.



39. Having considered the submission made by the Council, the Commissioner is satisfied with this explanation. She accepts that the Council holds (and held, on receipt of the request) no information falling within the scope of this request. The Commissioner is therefore satisfied that the exception in regulation 10(4)(a) of the EIRs applied to the request.
40. As in respect of requests 2 and 3, the Commissioner does not consider there to be any public interest in requiring the Council to make available any information covered by request 4. She accepts that no such information is (or was) held. The Commissioner therefore concludes that, in all the circumstances of this case, the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.

Request 7

41. Request 7 was for “*Details of how Council officials controlled costs on site.*”
42. As in relation to request 2, the Council informed the Commissioner that its Property Conservation Freedom of Information team carried out extensive searches of both electronic and paper files to look for the information requested. This involved searching electronic folders held by the Council’s surveying officer who was responsible for managing this project. The Council also explained that it searched email archives and reviewed paper files relating to this project. These searches did not reveal any information falling within the scope of the request. As a result, the Council concluded that it did not hold this information.
43. Having considered the submission made by the Council, the Commissioner is satisfied that the Council holds (and held) no information falling within the scope of this request. The Commissioner is therefore satisfied that the exception in regulation 10(4)(a) of the EIRs applied to the request.
44. As in respect of the preceding requests, the Commissioner does not consider there to be any public interest in requiring the Council to make available any information covered by request 7. She accepts that no such information is (or was) held. The Commissioner therefore concludes that, in all the circumstances of this case, the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.

Request 11

45. Request 11 was for “*A copy of comparison costs of renovating chimney stacks in brick and render vs. renovating them in masonry.*”
46. The Council responded as for request 2, relying on the searches described above. In the circumstances, the Commissioner is satisfied with this explanation and accepts that no relevant information is, or was, held. She therefore accepts that regulation 10(4)(a) of the EIRs applied to the request.



47. As in respect of the preceding requests, the Commissioner does not consider there to be any public interest in requiring the Council to make available any information covered by request 11. She accepts that no such information is (or was) held. The Commissioner therefore concludes that, in all the circumstances of this case, the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.

Regulation 5

Request 9

48. Request 9 was for "*The original bill of quantities and the most recent bill of quantities.*"
49. The Council responded, as for request 2, that officers in the Property Conservation Freedom of Information team carried out extensive searches of both electronic and paper files to look for the information requested. This involved searching electronic folders held by the Council surveying officer who was responsible for managing the project. The Council also explained that it searched email archives and reviewed a number of paper files relating to this project. These searches did not reveal any information falling within the scope of the request.
50. The Council confirmed that, after further investigation of Mr Tulloch's application, it could confirm that all information falling within the scope of this request had been identified and provided.
51. The Council explained that this was the only bill of quantities falling within the scope of Mr Tulloch's request at the time the request was received.
52. However, the Council informed the Commissioner that it had located a recent draft final account relating to Mr Tulloch's request. During the investigation, it was confirmed that this draft was created during January-February 2013, and therefore was not held by the Council when it received Mr Tulloch's request.
53. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. This obligation relates to information held by an authority when it receives the request. As the draft final account was not held by the Council at the time it received the request, it did not fall within the scope of the request. The Council indicated to the investigating officer that the final account would be provided to Mr Tulloch when completed.



DECISION

The Commissioner finds that the City of Edinburgh Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 and with the Environmental Information (Scotland) Regulations 2004, in responding to the information request made by Mr Tulloch.

Appeal

Should either Mr Tulloch 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.

Margaret Keyse
Head of Enforcement
15 May 2013



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;

...

(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.

...



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
 - (a) it does not hold that information when an applicant's request is received;
- ...