

Decision Notice 093/2020

Information related to 15 High Street, Old Aberdeen

The Applicant

Public authority: University of Aberdeen

Case Ref: 202000088



Scottish Information
Commissioner

Summary

The University was asked for information relating in any way to 15 High Street, Old Aberdeen for a specified period. The University considered the request vexatious and, to the extent that the information related to environmental information, manifestly unreasonable and refused to comply with it.

The Commissioner agreed that the request was vexatious and manifestly unreasonable when considered in the context created by previous correspondence on the same matter.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(6) (General entitlement); 14(1) (Vexatious or repeated requests)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (parts (a) and (c) of the definition of "environmental information"); 5(1) and (2) (Duty to make available environmental information on request); 10(1), (2) and (4)(b) (Exceptions from duty to make environmental information available)

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 17 October 2019, the Applicant made a request for information to the University of Aberdeen (the University). The information request read as follows:

Please would you supply me with all information of any kind held by the University's Department of Estates and Facilities, relating in any way to 15 High Street, Old Aberdeen, recorded in the period from 14th September 2019 to 17th October 2019 inclusive.

This would include all recorded information – all correspondence (emails, letters, memos, etc.), internal within the University or to and from a third party or parties.

Also, all reports, plans, drawings, memos, notes from telephone calls, diary entries, entries on databases, written notes of any kind, and all minutes of meetings or site visits.

2. The University responded on 12 November 2019. It refused to comply with the request on the grounds that it was vexatious (in terms of section 14(1) of FOISA) and manifestly unreasonable (in terms of regulation 10(4)(b) of the EIRs). The University commented that this was the tenth in a continuous series of "update" requests relating to this property. The University went on to explain why it considered the request to be vexatious and manifestly unreasonable.
3. On 24 November 2019, the Applicant wrote to the University requesting a review of its decision. It explained, in detail, why it did not consider the request to be vexatious or manifestly unreasonable.

4. The University wrote to the Applicant on 23 December 2019. It advised the Applicant that it had decided not to undertake a review of its initial response. It stated that it had received another request in this series, framed in the same terms, on the same day as the review request, without allowing the review process to operate effectively to re-consider the approach to the Applicant's requests. The University stated that this continued a pattern of behaviour that it considered to be vexatious or manifestly unreasonable.
5. On 16 January 2020, the Applicant wrote to the Commissioner. The Applicant 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. The Applicant stated it was dissatisfied because it did not believe that its request was vexatious or manifestly unreasonable.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 22 January 2020, the University was notified in writing that the Applicant had made a valid application. The case was then 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 University was invited to comment on this application and to answer specific questions. These related to its reasoning for finding the request to be manifestly unreasonable and vexatious.
9. The Applicant was also given a further opportunity to comment.
10. Submissions were received from both the University and the Applicant.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to him by both the Applicant and the University. He is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs

12. The University responded to the Applicant's request in terms of both the EIRs and FOISA.
13. Environmental information is defined in regulation 2(1) of the EIRs (the relevant parts of the definition are reproduced in the Appendix to this decision). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
14. The Commissioner's views on the relationship between FOISA and the EIRs are set out in detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹ (*Decision 218/2007*), and need not be repeated in full here. However, he will reiterate some of the key points which are relevant in this case:

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.aspx>

- (i) There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
 - (ii) Any request for environmental information, therefore, **must** be dealt with under the EIRs.
 - (iii) In responding to a request for environmental information under FOISA, an authority **may** claim the exemption in section 39(2).
15. In its submissions, the University stated that the request had a wide scope. It argued that, because the focus of the request is a physical building, part of an element of the environment, the majority of the information is likely to be covered by part (c) of the definition of environmental information in regulation 2(1) of the EIRs.
16. However, the University considered that the request would also encompass information that is not environmental in nature, such as leasing arrangements and information relating to internal decoration. Therefore, the University considered both regimes (FOISA and the EIRs) were relevant to the request.
17. Having considered the nature and likely content of the information covered by the request, the Commissioner is satisfied that at least some of it is likely to be environmental information as defined within regulation 2(1) of the EIRs. It relates to measures affecting or likely to affect the elements of the environment, and therefore falls within paragraphs (a) and (c) of the definition in regulation 2(1) of the EIRs.
18. The Commissioner also accepts that the request could encompass non-environmental information, and in that respect requires to be considered under FOISA too.

Was the request or manifestly unreasonable or vexatious?

19. Section 14(1) of FOISA states that section 1(1) (which confers the general entitlement to information held by such authorities) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious. Section 14(1) does not create an exemption, but its effect is to render inapplicable the general right of access to information contained in section 1(1). Accordingly, section 14(1) is not subject to the public interest test in section 2(1)(b) of FOISA.
20. Under the exception in regulation 10(4)(b) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request for information is manifestly unreasonable. If the authority finds that the request is manifestly unreasonable, it is still required to make the information available unless, in all the circumstances, the public interest in making it available is outweighed by that in maintaining the exception. In considering whether the exception applies, it must interpret it in a restrictive way and apply a presumption in favour of disclosure.
21. The Commissioner's general approach is that the following factors are relevant when considering whether a request is vexatious (under section 14 of FOISA) or is manifestly unreasonable (under regulation 10(4)(b) of the EIRs). These are that the request:
 - would impose a significant burden on the public body
 - does not have a serious purpose or value
 - is designed to cause disruption or annoyance to the public authority

- has the effect of harassing the public authority
- would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.

22. This is not an exhaustive list. Depending on the circumstances, other factors may be relevant, provided the impact on the authority can be supported by evidence. The Commissioner recognises that each case must be considered on its merits, taking all the circumstances into account. The terms "vexatious" and "manifestly unreasonable" must be applied to the request and not the requester, but an applicant's identity, and the history of their/its dealings with a public authority, may be relevant in considering the nature and effect of the request and surrounding circumstances.
23. Where the Commissioner is satisfied that a request is vexatious for the purposes of section 14(1), he will generally also be satisfied that it is manifestly unreasonable for the purposes of regulation 10(4)(b) of the EIRs. (The (English and Welsh) Court of Appeal concluded that, to all intents and purposes, the question of whether a request is vexatious under the equivalent provision in the Freedom of Information Act 2000 and of whether a request is manifestly unreasonable under the equivalent provision in the Environmental Information Regulations 2002 has the same meaning.²)

The Applicant's submissions

24. The Applicant explained that its objectives are to protect and preserve the heritage and special character of Old Aberdeen. The Applicant stated its objection to any potential development of the building at 15 High Street, Aberdeen, which is a listed building. The Applicant was concerned that there may be a move to re-purpose the usage of the property from a family home to a different designation. A previous application for a change of designation had been refused. The Applicant pointed out that there had been around 200 letters of objection to the 2017/18 application for planning permission to change the purpose of the building.
25. The Applicant explained that it had been making information requests to the University (in the terms as noted in paragraph 1 above) on a regular basis. The requests were for all and any information pertaining to the address and each request covered the latest period of time in question. The Applicant explained that it wished to be kept abreast of any potential developments in the pipeline for the address in question. It did not accept that most of information was available to it, as the University had argued, through the Old Aberdeen Community Council. Furthermore, the Applicant did not accept that the planning process provided timeous information, highlighting that there is often only a two week period to make comment. To keep abreast of developments, the Applicant made periodic requests to the University asking for all and any information held by the University for the specified address and added the latest specific time period to each request.
26. The Applicant submitted that its information requests to the University were the only way it could obtain reliable information on any planning matters that may be under consideration for the property in question. The Applicant stated that it had heard from a local resident about a possible proposal for a further development being considered for the building in question, so argued that this gave a valid purpose to the requests.

² <http://www.bailii.org/ew/cases/EWCA/Civ/2015/454.html>

27. The Applicant wanted to be kept periodically updated as to whether there were any plans afoot for the building. To achieve this, the Applicant was making periodic requests to the University for “all and any information” relating to the building. The Applicant argued that the requests are not repeated because each one is for the latest specific time period. At the date of the Applicant’s appeal to the Commissioner, there had been 13 of these requests made to the University.

The University’s submissions

28. The University explained that, in July 2017, a University of Aberdeen student submitted a planning application to Aberdeen City Council (the Council) to change the use of 15 High Street from a residential property to a public house. The application generated considerable interest, with 396 representations in support and 234 representations against. The application was refused by the Council on 27 April 2018 and was refused on appeal to the Scottish Government Reporter on 16 October 2018. (Given the Applicant’s reference to having been told by a local resident that a further development proposal was being considered, the Commissioner asked the University if there were any plans to develop the building. The University confirmed that there were no current plans.)
29. The University advised the Commissioner that the 2017 planning application prompted the Applicant to start making requests to the University under freedom of information legislation.
30. Since July 2017, the Applicant has made 44 requests to the University, 19 of which relate to 15 High Street. The University considers the pattern of all 44 requests is relevant to its decision to refuse the request as vexatious/manifestly unreasonable response.
31. The University explained that, in three requests submitted between 28 September 2017 and 20 April 2018, when 15 High Street was subject to the planning proposal, the Applicant sought all information of any sort held by the Estates & Facilities directorate relating to the building for the previous 20 years. The University provided all the information held, subject to a small number of redactions. The Commissioner agreed that no further information was held by the University following appeals to the Commissioner (*Decisions 140/2018³ and 183/2018⁴*).
32. The University submitted that the Applicant made 12 “update requests”, starting in January 2018, seeking new information held by the University relating to 15 High Street to add to the corpus of information provided in response to the first three requests. These took the form of a request for all information of any sort generated by the Estates & Facilities directorate since the last request in the series.
33. In October 2019, the Applicant began to submit requests and this pattern has since continued. The monthly diversion of Estates & Facilities staff to search all diaries, notebooks, maintenance logs, email boxes and the property database for recently-generated information relating to 15 High Street, while, according to the University, the Applicant criticises its efforts is, in the University’s view, disproportionately disruptive; appears to be an extended campaign of unreasonable behaviour towards the Estates & Facilities directorate; and has the effect of harassing those staff.

³ <https://www.itspublicknowledge.info/uploadedFiles/Decision140-2018.pdf>

⁴ <https://www.itspublicknowledge.info/uploadedFiles/Decision183-2018.pdf>

34. The University commented on the fact that the Applicant was repeatedly asking for “all information of any kind” rather than describing the actual information it was looking for (e.g. any potential planning applications received or pre-planning information). The University argued that carrying out these successive searches was diverting staff time from core functions.
35. The University submitted that most of the information furnished to the Applicant to date (i) had been otherwise available to it via the Old Aberdeen Community Council, or (ii) was of little value (e.g. copies of gas bills for the property).
36. The University was of the view that, while it had responded to all of the other requests in this ongoing series, it had now come to the point where it believed that the requests were of little value or purpose and simply served to harass the University staff.
37. The University accepted that it had not been a significant burden to respond to these requests, given that there had been so little activity that would generate information since 2018. It estimated that it takes around three hours’ work to search for information and respond. It is not the burden as such that the University was pressing, but rather the fact that the requests were, in its view, of little value or purpose and the constant flow of information requests had the effect of harassing the University staff.
38. The University argued that making these requests in order to gain an early indication of any potential planning proposals ahead of any normal planning process would not make any difference to the planning process.
39. The University concluded that both section 14(1) of FOISA and regulation 10(4)(b) of the EIRs should be upheld. (In relation to regulation 10(4)(b), the University also argued that, on balance, the public interest fell in favour of maintaining the exception. This is considered in more detail below.)

The Commissioner’s findings

Significant burden on the authority

40. In the Commissioner's briefings on sections 14(1) of FOISA⁵ and on regulation 10(4)(b) of the EIRs,⁶ the Commissioner indicates that a request will impose a significant burden on a public authority where dealing with it would require a disproportionate amount of time and the diversion of an unreasonable proportion of its financial and human resources away from its other statutory or core operations.
41. In this case, the Commissioner notes that the University has not stated that a significant burden has been imposed by the Applicant’s individual requests. As stated in the Commissioner’s guidance, the history of the Applicant’s dealings with an authority may be relevant in determining whether a request is vexatious/manifestly unreasonable. The Commissioner is of the view that this decision should take account of all the requests to date as a series of requests on the same subject matter. He is therefore not basing this decision solely on the request made on 17 October 2019.

⁵ https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Vexatious_or_repeated_requests.aspx

⁶ https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Manifestly_unreasonable_requests.aspx

Disruption and annoyance to the public authority

42. Having considered the submissions from the Applicant, the Commissioner is satisfied there is nothing to indicate that the Applicant's *intent* is to cause disruption or annoyance to the University. The Commissioner accepts that the Applicant's intent is to be apprised of any information that may affect the planning situation with the building in question.

No serious purpose or value

43. The Commissioner notes that the Applicant is repeatedly asking the University for "all and any information" pertaining to the building in question. While he can understand the Applicant's eagerness to be able to access any potential planning information at the earliest opportunity, the wording of the requests means it is likely a lot of information thrown up would in fact be of no serious purpose or value to the Applicant (see, for example, the gas bills).
44. Therefore he must find that the requests as currently written, and the current pattern of the requests, means that the requests have little serious purpose or value. However, if the wording of the requests had been tailored to ask for more specified information (e.g. for information pertaining to any potential planning matters relating to the address) or were less frequent, then the Commissioner would not necessarily reach this same conclusion.

The effect of harassing the public authority

45. Having considered this matter carefully, the Commissioner accepts that the constant requests made by the Applicant, in attempt to effectively "fish" for any information relating to the building, are having the effect of harassing the University staff, even if this is not the Applicant's intention.

Manifestly unreasonable or disproportionate

46. Taken in isolation, the Applicant's request of 17 October 2019 might not appear to be manifestly unreasonable: the request is presented in a civil manner and relates to a relatively short timescale. The Commissioner is aware, however, that the unreasonable nature of a request or requests may only emerge after considering them in the context created by previous or ongoing correspondence.
47. There are other ways for the Applicant to seek the type of planning information it seeks. In cases where a planning application is made there is always a due process to go through. This due process necessarily involves public consultation, particularly in the case of a listed building such as the one which is the subject of this decision. Once a developer has shown an interest in developing a piece of land owned by a public authority, and once such an interest reaches the stage where it requires to be in the public domain, information relating to the application will be made public and, of course, the Applicant (or any other interested parties) would have the right to make an information request on the planning application and related matters.
48. Given the number and frequency of the Applicant's requests, and the matters considered above, the Commissioner is satisfied that the requests would, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.

Commissioner's views on vexatious/manifestly unreasonable

49. For the reasons set out above, the Commissioner is satisfied that the request is vexatious in terms of section 14(1) of FOISA and manifestly unreasonable, in terms of regulation 10(4)(b) of the EIRs.

EIRs: the public interest test

50. As noted above, the exception in regulation 10(4)(b) is subject to the public interest test in regulation 10(1)(b) of the EIRs. This means that, although the Commissioner is satisfied that the request is manifestly unreasonable, he must require the University to respond to the environmental aspects of the request if the public interest in making the information available outweighs that in maintaining the exception.
51. The Applicant submitted that any matters concerning the potential re-designation of a listed building were of public interest and concern. The Applicant provided copies of its official objections to the previous proposal to change the designation of the building from a family home to commercial premises.
52. The University submitted that the current request would not enable the public to understand what is happening in the environment in a way that enables informed participation in decision-making.
53. While the University agreed that there was, in general, a public interest in making information accessible in order to improve accountability and participation in decision-making, it considered this was not a weighty argument in this case, given the lack of significant activity or environmental decisions involving 15 High Street since October 2018.
54. The University also acknowledged that there was a public interest in ensuring that the statutory information rights regime operates effectively, including the responsible exercise of those rights by a requester in a way that does not compromise a public authority's public tasks or which restricts access to information for other requesters by making excessive and disproportionate requests. This interest, the University submitted, was highly relevant to the particular pattern of requests by the Applicant, and supported the request being refused.
55. The Commissioner has already concluded that the request is manifestly unreasonable. As the University has recognised, this exception exists in order to prevent authorities being compromised by the making of excessive or disproportionate requests. Having found the request to be manifestly unreasonable, he considers that the public interest in the information requested would have to be very strong for the Commissioner to order disclosure.
56. While he recognises the Applicant's interest in the building at 15 High Street, there is an official planning process which allows these matters to be considered. He is of the view that the public interest in this case would, to a large extent, be served by the operation of the official planning and consultation process.
57. In all the circumstances, the Commissioner is unable to conclude that the public interest in making the information held by the University available is outweighed by the public interest in maintaining the exception in regulation 10(4)(b) of the EIRs. The University was, therefore, entitled to apply that exception to refuse to make the requested information available.

Conclusion

58. The Commissioner therefore concludes that the University was entitled to withhold the information requested under the exception in regulation 10(4)(b) of the EIRs and under section 14(1) of FOISA.
59. Consequently, the Commissioner finds that the University complied with section 1(1) of FOISA and regulation 5(1) of the EIRs when responding to the Applicant's request.

Decision

The Commissioner finds that the University of Aberdeen 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 the Applicant.

Appeal

Should either the Applicant or the University 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

13 August 2020

Appendix 1: 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.

14 Vexatious or repeated requests

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.

...

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.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that

...

- (b) the request for information is manifestly unreasonable;

...

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