

Decision Notice

Decision 114/2015: Ms Edna McLeod and Glasgow City Council

Information regarding repairs at a named property

Reference No: 201401884

Decision Date: 23 July 2015



Scottish Information
Commissioner

Summary

On 16 May 2014, Ms McLeod asked Glasgow City Council (the Council) for information relating to repairs to a common stair at a named property.

The Council told Ms McLeod it did not have to disclose the information because, in terms of regulation 6(1)(b) of the EIRs, it was already publicly available and easily accessible to her. Following a review, Ms McLeod remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had failed to respond to Ms McLeod's request for information in accordance with Part 1 of FOISA and with the EIRs. The Council wrongly relied on regulation 6(1)(b) of the EIRs to withhold some environmental information, and also failed to identify that some of the withheld information was not environmental information and so should have been considered under FOISA.

The Commissioner required the Council to issue a new review outcome to Ms McLeod that complied with FOISA and the EIRs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (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) (Interpretation) (definitions (a), (b), (c) and (f) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 6(1)(b) (Form and format of information); 9(1) (Duty to provide advice and assistance)

Building (Procedure) (Scotland) Regulations 2004 (the 2004 Regulations) regulations 57(1), (2)(b); 58

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 16 May 2014, Ms McLeod made the following request to the Council:

Glasgow City Council officers were involved with repairs to a common stair at [named residential address].

- (i) *With reference to the above, I request all emails and letters between council officers regarding this property*
 - (ii) *I request all minutes of all meetings regarding this property*
 - (iii) *I request all correspondence between council officials and outside parties*
2. The Council responded on 11 June 2014. In its response, the Council told Ms McLeod that, under regulation 6(1)(b) of the EIRs, it did not have to provide the information she had asked

for as it was publicly available and easily accessible to her. The Council told Ms McLeod that the information was contained in Part II of the Building Standards Register. (Under section 58 of the 2004 Regulations, interested parties are allowed to obtain, for a fee, copies of documentation contained in the Building Standards Register.) The Council told Ms McLeod who to contact, should she wish to proceed with making an application under the 2004 Regulations.

3. On 15 June 2014, Ms McLeod wrote to the Council, requesting a review of its decision. She did not believe that all of the information she had asked for would be included in Part II of the Building Standards Register. She commented that people who lived in the building had been locked out of their homes for months and that people had a right to see what Council officers had done.
4. The Council notified Ms McLeod of the outcome of its review on 10 July 2014. The Council maintained its original position that, under regulation 6(1)(b) of the EIRs, it was not obliged to comply with her request because the information was already publicly available and easily accessible to her. It confirmed that all of the information covered by her request was contained in Part II of the Building Standards Register. The Council told her that it charged a standard fee of £110 to obtain information from Part II of the Register and that, if the Council handled her request under the EIRs, the fees would be “substantially higher”.
5. On 21 July 2014, Ms McLeod wrote to the Commissioner. Ms McLeod 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. Ms McLeod stated she was dissatisfied with the outcome of the Council’s review. She did not accept that the information she had requested was contained in Part II of the Building Standards Register, nor did she accept that it would cost “hundreds of pounds” to provide her with the information under the EIRs. She believed that the Council was exaggerating costs in order to obstruct the disclosure of information, and that its actions went against the spirit of Freedom of Information legislation.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Ms McLeod 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. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 12 August 2014, the Council was notified in writing that Ms McLeod had made a valid application. In this letter, the Council was invited to comment on Ms McLeod’s application and to answer specific questions, including justifying its reliance on any provisions of FOISA and the EIRs it considered applicable to the information requested.
8. On 4 September 2014, the Council was asked to send the Commissioner the information it was withholding from Ms McLeod.
9. Correspondence took place, over a period of months, between the Commissioner’s staff and the Council on the scope of the 2004 Regulations, and on why the Council considered the information withheld from Ms McLeod to be contained within Part II of the Building Standards

Register. The submissions received from the Council are summarised in the Commissioner's Analysis and Findings below.

10. On 7 May 2015, members of the Commissioner's staff met with the Scottish Government's Building Standards Division to discuss, in general, the issues raised by this case, and to discuss the types of information which Part II of the Building Standards Register should contain. A note of this meeting was sent to the Council on 3 June 2015 and the Council was given an opportunity to comment on the matters which had been discussed.

Commissioner's analysis and findings

11. 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 Ms McLeod and the Council. She is satisfied that no matter of relevance has been overlooked.

The withheld information

12. The information being withheld from Ms McLeod comprises some 269 documents (mainly emails, with some of the emails containing additional attachments).

FOISA or the EIRs?

13. In this case, the Council concluded that all of the information withheld from Ms McLeod was environmental information. It therefore responded to Ms McLeod's request under the EIRs. "Environmental information" is defined in regulation 2(1) of the EIRs (the relevant parts of the definition are reproduced in Appendix 1). Where information falls within this definition, a person has a right to access it under the EIRs, subject to various restrictions and exceptions.
14. The Council told the Commissioner that, while the incident which led to the repairs at the property concerned a reported collapse of a stair tread, the underlying reason for the collapse of the tread was unaddressed movement in the entire staircase over a period of time. The Council explained that a dangerous building notice, issued under sections 29 and 30 of the Building (Scotland) Act 2003, was placed on the named property, requiring works to be carried out to re-instate the structural integrity of the common stair. The Council told the Commissioner that the structural repairs required by the Notice included repairs to the entire stair and its landings, as well as structural ties being inserted across the areas of movement in the supporting walls around the stairwell.
15. The Council referred the Commissioner to definition (f) of environmental information in regulation 2(1) of the EIRs. In terms of definition (f), environmental information includes:
the state of human health or safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c).

(The references to paragraphs (a), (b) and (c) are to the definitions of "environmental information" in regulation 2(1) of the EIRs.)
16. The Council also referred to *The Aarhus Convention: An Implementation Guide*,¹ which describes "built structures" as man-made constructions and indicates that the definition is not

¹ http://www.unece.org/env/pp/implementation_guide.html

limited to large buildings and objects such as dams or bridges, but also covers small constructions (page 55).

17. Having considered the nature of the withheld information, the Commissioner accepts that some of it comprises environmental information as defined within regulation 2(1) of the EIRs.
18. The withheld information contains discussions about the structural issues affecting the named property and includes plans and technical information, as well as descriptions of possible solutions to the structural problems. The Commissioner is satisfied that such information is environmental information as defined by regulation 2(1) of the EIRs, and falls within paragraph (f) of the definition of environmental information (“...conditions of built structures...”) in as much as such structures are, or may be affected by, the state of the elements of the environment referred to in paragraph (a) of regulation 2(1) of the EIRs, or, through those elements, by matters referred to in paragraphs (b) and (c) of the regulation.
19. However, the Commissioner does not accept that all of the withheld information is environmental information: the information includes, for example, emails containing routine conversations about arranging meetings or visits to the named property; and notifications that council officials will be absent from the office on certain dates or that correspondence has been, or will be, forwarded on. Even though the information relates to activities at the property, the Commissioner does not consider that all of this information is environmental in nature. This information should have been considered under FOISA, and not under the EIRs.
20. Having drawn this conclusion, the Commissioner finds that, while the Council correctly responded in terms of the EIRs with regard to the information which was environmental, it failed to recognise that some of the requested information was not environmental information and that it was required to consider disclosure of such information in terms of FOISA and not in terms of the EIRs.
21. The Commissioner finds that by failing to consider and respond to Ms McLeod’s request in terms of FOISA, insofar as it related to non-environmental information, the Council failed to comply with section 1(1) of FOISA.

Section 39(2) of FOISA – environmental information

22. The exemption in section 39(2) of FOISA provides, in effect, that environmental information 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 entitled to apply this exemption to the parts of the withheld information that comprised environmental information.
23. As there is a separate statutory right of access to environmental information available to Ms McLeod, the Commissioner accepts that in this case the public interest in maintaining this exemption (with regard to the environmental information being withheld) and in dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosing this environmental information under FOISA.

Regulation 6(1)(b)

24. Regulation 6(1)(b) of the EIRs states that, where an applicant requests that environmental information be made available in a particular form or format (it is clear that Ms McLeod was asking for copies of the information), 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.
25. In its review outcome, the Council informed Ms McLeod that all of the information she requested was contained in Part II of the Building Standards Register, and that it could be made available to her on payment of a fee.
26. In order to determine whether the Council responded to Ms McLeod's request correctly, the Commissioner must be satisfied as to whether, at the time it received the request, the environmental information held by the Council (and which fell within the scope of Ms McLeod's request) was both publicly available and easily accessible to Ms McLeod, as asserted by the Council.
27. Regulation 57(2)(b) of the 2004 Regulations lists the documents which Part II of the Building Standards Register should contain. This includes copies of building warrants, completion certificates, energy performance certificates, principal drawings and specifications and "all other documents submitted to the local authority for registration in the building standards register." (Regulation 57(2)(b) is set out in full in Appendix 1.)
28. Having compared the information withheld from Ms McLeod against regulation 57(2)(b), the Commissioner could not accept that all of the information would be contained in Part II of the Building Standards Register. Accordingly, she asked the Council to examine 20 of the withheld documents and to explain which of the definitions in regulation 57(2)(b) they fell under.
29. In response, the Council told the Commissioner that, as it is required to include particulars of dangerous building notices in Part I of the Building Standards Register (regulation 57(2)(a)(iv)), the Council treats the entire contents of a file to which such a notice relates as documents which should be contained in Part II of the Building Standards Register. This was, according to the Council, in the interests of being open and transparent. The Council explained that any file pertaining to the Council's dealings with buildings, deriving from its powers under the Building (Scotland) Act 2003, is retained and accessed pursuant to the 2004 Regulations. It considers this approach to be entirely logical.
30. Having considered all 20 of the sample documents, the Council was content that each fell within one or more of the definitions set out in regulation 57(2)(b) of the 2004 Regulations. Accordingly, in the Council's view, all of the documents were correctly held in Part II of the Building Standards Register.
31. The Council said that, on reading regulation 57(2)(b) of the 2004 Regulations, it was not clear which aspects of its files (for dangerous building notices, etc.) ought to form Part II of the Building Standards Register. However, it interpreted regulation 57(2)(b)(vi) as including any information relating to such a notice. In the Council's view, it would be illogical for it only to include some parts of the file in the Register.

The Commissioner's considerations

32. The Commissioner notes the Council's arguments on Part II of the Building Standards Register, but she is not convinced by them. In particular, the Commissioner disagrees that any document or piece of information that relates to a dangerous building notice, or is contained in a dangerous building notice file, should be contained in Part II of the Building Standards Register.
33. The Scottish Government has issued guidance to local authorities on what Part II of the Building Standards Register should contain. This guidance is contained in The Scottish Building Standards Procedural Handbook (third edition)². Paragraph 8.1.3. of the Handbook states that Part II of the Register should contain:
- *copies of warrants and completion certificates, including certificates from approved certifiers of design and construction*
 - *the principal drawings and specifications*
 - *any other document submitted by verifiers for registration in connection with particular projects*
 - *any copies of energy performance certificates and any statement of sustainability (new buildings only)*
 - *any copies of fire safety design summaries (new and converted non-domestic buildings only)*
34. While the list in the Handbook is slightly different from the list in regulation 57(2)(b) of the 2004 Regulations, the Handbook does not support the Council's view that all information in a relevant file should be contained in Part II of the Building Standards Register. It is clear to the Commissioner that many of the documents withheld by the Council (such as emails making administrative arrangements, and emails about access or lack of access for tenants and owners) do not fall under either of the lists of categories.
35. The Commissioner recognises that regulation 57(2)(b)(vi) is wide ("all other documents submitted to the local authority for registration in the building standards register"). She does not consider that email exchanges between concerned tenants or owners and the Council, or routine correspondence between council officers, qualifies as information which was *submitted to the Council for registration in the building standards register*. It is merely correspondence which records administrative actions which it has taken.
36. As indicated above, during her investigation, the Commissioner's staff met with the Scottish Government's Building Standards Division, including with the Head of the Building Standards Division, to discuss the type of documents that the Government considered should and should not be included in Part II of the Building Standards Register.
37. After this meeting, the investigating officer advised the Council that, in the Commissioner's view, its practice does not reflect the intention behind the legislation as to the documents that should be registered in Part II of the Building Standards Register. The Council was then invited to consider what information could be disclosed under the EIRs. The Council chose not to do this, but instead referred the Commissioner to its earlier submissions.

² <http://www.gov.scot/Topics/Built-Environment/Building/Building-standards/publications/publeg/prochb3rd>

The Commissioner's considerations

38. The Commissioner does not accept that the Council was entitled to include all of the information covered by Ms McLeod's request in Part II of the Building Standards Register. She therefore rejects the argument that all the environmental information requested by Ms McLeod was publicly available and easily accessible to her by virtue of the statutory provisions governing access to information in Part II of the Register. Accordingly, the Commissioner finds that the Council was wrong to apply regulation 6(1)(b) of the EIRs to all the environmental information covered by Ms McLeod's request, and, in doing so, it breached regulation 5(1) of the EIRs.

Duty to advise and assist

39. As noted above, the Council argued that, by considering the contents of the entire dangerous building notice file to be included in Part II of the Building Control Register, it is being open and transparent. The difficulty with this approach is that it prohibits individuals who are not "interested parties" from obtaining copies of information in Part II of the Register.
40. Copies of documents contained in Part II of the Building Standards Register can only be provided to those who are classed as an "interested party." This is defined in regulation 58(5) of the 2004 Regulations as:
- any owner, occupier, tenant or prospective owner, occupier or tenant of the relevant building or an adjoining building*
41. This is why it was important for the Commissioner to consider, in detail, what documents should be contained in Part II.
42. During the investigation, the Council told the Commissioner that it has "always been willing to produce the information to [Ms McLeod] free of charge for viewing at the Council offices". Ms McLeod has made it clear that she does not wish to inspect the documents.
43. If Ms McLeod is not an "interested party" she is not entitled to obtain copies of any documents in Part II of the Building Standards Register (see regulation 58(3), read with regulation 58(5)). The Council did not explain this to Ms McLeod in its response or review response, or take any steps to identify whether or not Ms McLeod was an "interested party" before determining that the information she requested was already publicly available and easily accessible to her. The Commissioner finds that, in failing to provide Ms McLeod with this explanation or to take steps to establish whether she was an "interested party", the Council failed to comply with the duty to provide advice and assistance in regulation 9(1) of the EIRs.

Decision

The Commissioner finds that Glasgow City Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Ms McLeod.

By failing to identify that some of the requested information was not environmental information as defined in regulation 2(1) of the EIRs, the Council failed to comply with section 1(1) of FOISA. Additionally, by wrongly withholding all of the environmental information under regulation 6(1)(b) of the EIRs, the Council breached regulation 5(1) of the EIRs.

The Commissioner also found that the Council failed to comply with regulation 9(1) of the EIRs, in failing to provide Ms McLeod with advice and assistance about what, if any, statutory rights of access she has under the Building (Procedure) (Scotland) Regulations 2004.

The Commissioner therefore requires the Council to provide a new response to Ms McLeod's requirement for review.

- (i) Where the information does not comprise environmental information, the Council must issue a review outcome to Ms McLeod that complies with FOISA.
- (ii) Where the withheld information is environmental information, the Council must consider whether it is correctly contained within Part II of the Building Standards Register, giving due regard to the Commissioner's comments. If the withheld information is correctly contained within Part II of the Register, the Council should consider whether Ms McLeod is an interested party (see paragraph 40 above) and so whether regulation 6(1)(b) applies. If the withheld information is incorrectly contained within Part II of the Register they must consider such information afresh. In both instances the Council must issue a review outcome which complies with the EIRs.

The Council is required to respond by **Friday 11 September 2015**.

Appeal

Should either Ms McLeod or Glasgow City 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.

Enforcement

If Glasgow City Council (the Council) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner

23 July 2015

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;
- (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;

...

- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

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.

9 Duty to provide advice and assistance

(1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...

The Building (Procedure) (Scotland) Regulations 2004

57 Maintenance of records

- (1) This regulation applies to the building standards register
- (2) The building standards register shall contain two parts as follows –
...
 - (b) Part II which shall consist of copies of –
 - (i) building warrants;
 - (ii) completion certificates;
 - (iia) fire safety design summaries;
 - (iii) any energy performance certificates;
 - (iia) statements of sustainability;
 - (iv) any certificates from approved certifiers submitted in support of building warrants or completion certificates;
 - (v) principal drawings and specifications; and
 - (vi) all other documents submitted to the local authority for registration in the building standards register...
...

58 Inspection of records and applications

- (1) Subject to paragraph (3), Parts I and II of the building standards register shall be available for inspection by the public at all reasonable hours and without prejudice to that generality Part I shall be published on a website maintained by the relevant local authority.
- (2) Subject to paragraph (3), the local authority shall on payment of the appropriate fee provide copies of any of the documents contained in Part II of the building standards register.
- (3) Documents shall not be available for copying in terms of paragraph (2) in the cases to which paragraphs (4) or (5) apply.
- (4) This paragraph applies where the relevant building is a non-residential building, a prison, a building where a person may be legally detained or otherwise held in legal custody, the Scottish Parliament or a building belonging to Her Majesty in right of Her private estates where copying would raise security concerns but not where the owner of the building to which the documents relate has consented, in writing, to that copying.
- (5) This paragraph applies where paragraph (4) does not apply and where the relevant building is a residential building unless the application is by an interested party and for the purposes of this paragraph “*interested party*” means any owner, occupier,

tenant or prospective owner, occupier or tenant of the relevant building or an adjoining building.

- (6) A local authority may remove a document from the building standards register if the disclosure or copying of that document would raise security concerns.

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