

Decision Notice

Decision 132/2016: James G Findlay Ltd and Dumfries and Galloway Council

Contract information

Reference No: 201600558
Decision Date: 23 June 2016



Scottish Information
Commissioner

Summary

On 14 January 2016, James G Findlay Ltd (JGFL) asked Dumfries and Galloway Council (the Council) for information regarding the awarding of specific contracts for traffic management works. The Council responded by providing some information, whilst stating that other information was not held.

Following an investigation, the Commissioner found that JGFL had made a request for environmental information and that the Council had failed to respond properly under the EIRs.

However, the Commissioner was satisfied that the Council did not hold any information falling within parts d), e), g) and h) of JGFL's request

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) (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); 13 (Refusal to make 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 14 January 2016, JGFL made a request for information to the Council. The information requested was in relation to the DG First (the Council's service delivery arm) procurement of outsourced traffic management between 1 April 2014 and 1 January 2016. JGFL's request included:
 - a) The names of the 3 organisations contacted for each quotation.
 - b) How the organisations were contacted, i.e. phone, email, letter.
 - c) The individual contacted and the individual submitting the subsequent quote at that organisation.
 - d) The completed call log/quote request and the organisation reply log.
 - e) The preferred bidder for each individual quote request.
 - f) The reason for the decision of which organisation to award the works to.
 - g) The quality/price percentage used to determine the award.
 - h) The local/outsourced organisation usage percentage split for the entire period.

2. The Council responded on 18 February 2016. In relation to parts a) and b) of the request, the Council informed JGFL of the names of the three organisations contacted and that contact had been made by phone call or letter. It stated that it was withholding information held relative to part c) under section 38(1)(b) of FOISA.
3. The Council explained that it did not hold information relating to part d) of the request. In relation to part e) and f) the Council further informed JGFL of the name of the preferred bidder, stating this bidder was the only one available. The Council offered some explanation regarding part h), but did not respond to part g) of JGFL's request.
4. On 2 March 2016, JGFL wrote to the Council, requesting a review of its decision. It did not believe parts g) and h) had been answered. JGFL also sought clarification regarding parts a) and e), and submitted that the Council should hold information regarding part d).
5. The Council notified JGFL of the outcome of its review on 24 March 2016. The Council stated that the response to part a) was valid and accurate. It confirmed that the information requested at parts d), g) and h) were not held.
6. In relation to part e), the Council provided a further explanation but submitted that it could not provide the clarification JGFL was looking for as the information was not held (not every single minor job had been tendered and quoted for).
7. In relation to part d), the Council did inform JGFL that it held other information relative to the quotes received. As these quotes did not form part of the initial request, the Council advised JGFL that it might wish to submit a new request.
8. On 25 March 2016, JGFL wrote to the Commissioner's office. JGFL 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.
9. JGFL stated it was dissatisfied with the outcome of the Council's review. It believed the Council did hold information falling within the scope of parts d), g) and h) of the request. In relation to part e), it queried whether the review outcome matched the initial response.

Investigation

10. The application was accepted as valid. The Commissioner confirmed that JGFL 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.
11. On 12 April 2016, the Council was notified in writing that JGFL had made a valid application. The case was allocated to an investigating officer.
12. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 26 April 2016, the Council was invited to comment on this application and answer specific questions. These included whether the request should have properly been dealt with under the EIRs. The Council was asked to explain the steps it had taken to identify and locate the information requested.
13. The Council responded on 10 May 2016, accepting that the request was for environmental information and should have been dealt with under the EIRs: as a result, it applied the exemption in section 39(2) of FOISA (see below).

14. The Council further submitted that in relation to part d), e), g) and h) of the request it wished to rely upon regulation 10(4)(a) of the EIRs as it did not hold the information requested.
15. The Council apologised for the confusion caused by its handling of the request.

Commissioner's analysis and findings

16. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both JGFL and the Council. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

17. The Commissioner's thinking on the relationship between FOISA and the EIRs is set out in detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹ and need not repeat it in full here.
18. In its submissions to the Commissioner, the Council acknowledged that JGFL's request should have been responded to under the EIRs and stated that it wished to rely on the exemption in section 39(2) of FOISA in relation to all the information requested. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs.
19. Having considered the terms of the request and the Council's submissions on this point, it is clear that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns the awarding of contracts relative to traffic management works and, as such, the Commissioner is satisfied that it would fall within either paragraph (a) or paragraph (c) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in Appendix 1 to this decision).
20. In this case, therefore, the Commissioner accepts that the Council was entitled to apply the exemption in section 39(2) of FOISA to the withheld information, given her conclusion that it is properly considered to be environmental information. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
21. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. She has consequently proceeded to consider this case in what follows solely in terms of the EIRs.
22. As the Council failed to recognise and respond to the request as a request for environmental information, the Commissioner must find that it failed to respond in accordance with regulation 5(1) of the EIRs.

Regulation 5(1) of the EIRs

23. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it

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

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).

24. 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.
25. If no such information is held by the authority, the exception in regulation 10(4)(a) of the EIRs should apply. In applying any exception, regulation 13 requires the authority to give the applicant notice in writing: the requirements for giving notice are stipulated in the regulation, which is reproduced in Appendix 1.
26. The Commissioner has taken into account the submissions provided by JGFL, in which it provides reasons why it believes the Council should hold the information requested.

Regulation 10(4)(a) of the EIRs

27. 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. As indicated above, the exception in regulation 10(4)(a) is subject to the public interest test.
28. During the investigation, the Council provided submissions in response to the questions put by the investigating officer on this matter. The Council explained that any information held would be held within the relevant depot office files. It explained that because the work was outside the main "4G" contract, very few jobs per year were processed and most were under the £3000 limit (meaning telephone call quotes were acceptable). It further explained that such jobs were usually sought at relatively short notice: they would generally be undertaken in-house, quotes being sought only if that were not possible.
29. The Council also stated that there is no standard recording procedure for the process and that, consequently, the information requested was not held. It confirmed that it did not create or hold any logs of the kind requested by JGFL (part d)), stating that quotes were only recorded when required. Information was not held on a job-by-job basis, so it lacked even the material with which to create a log.
30. In this regard, the Council intimated that it was to consider whether records of all such telephone call quotes should be recorded in future (something which the Commissioner would recommend).
31. In relation to part e) of the request, the Council acknowledged that its response to JGFL was inaccurate and should not have confirmed that the company in question was the preferred bidder in each case. The correct response should have been that the information was not held. It explained that the response had been provided from memory: during the investigation, the staff concerned acknowledged that this might not have been accurate.
32. The Council also confirmed that no information was held for parts g) and h) of the request. In relation to part g), it explained that a quality/price percentage figure was not held per quote, on the basis that it only used "Sector Scheme Approved Companies" (which were all deemed to provide the same level of quality). It stated that no further quality assessment was created

or processed. Regarding the absence of the percentage figure sought in part h), it referred to the absence of recorded records in relation to quotes (see above).

33. Having considered all relevant submissions and the terms of JGFL's request, the Commissioner accepts that (during the investigation) the Council took adequate, proportionate steps to establish whether it held any information falling within the scope of parts d), e), g) and h) of the request (i.e. those parts covered by JGFL's application).
34. As mentioned above, the Commissioner can only consider whether information is actually held by the Council, not what information it should hold or what an applicant believes it should hold.
35. In this case, therefore, the Commissioner is satisfied that the Council did not hold the information requested by JGFL, insofar as it forms the subject matter of JGFL's application.
36. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs and can only be upheld if, in all the circumstances, the public interest in maintaining the exception outweighs the public interest in making the information available. The Commissioner is satisfied that the Council does not (and did not) hold the information in question. Consequently, she does not consider there to be any conceivable public interest in requiring that the information be made available. The Commissioner therefore concludes that 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.
37. The Council was, therefore, entitled to apply regulation 10(4)(a) of the EIRs in this case. In doing so, it should have given JGFL notice in terms of regulation 10(4)(a) of the EIRs. As indicated above, in failing to apply the EIRs at all, it failed to comply with regulation 5(1) of the EIRs.

Handling of request

38. The Commissioner is concerned that it appears to have taken the Council until an application had been made to the Commissioner before it took any appropriate steps to determine whether it actually held the requested information. In this case, it is apparent that the Council issued a response which could not be justified (in respect of parts of the request, at least) before considering whether the information was held.
39. As accepted by the Council in its submissions to the Commissioner, the responses provided to JGFL were confusing and inaccurate, having been provided from memory. The Commissioner considers that it is not sufficient to merely rely on the memory of staff when responding to an information request. Recollection may be helpful, but it is not generally a substitute for robust searches.
40. Whilst no useful purpose would be served by requiring the Council to take any specific action in this case, the Commissioner would urge the Council to ensure that (in response to future information requests) it takes reasonable steps to establish whether it actually holds any relevant information before providing the applicant with a response. Future breaches of this kind may lead to the Commissioner taking action under her Intervention Strategy.

Decision

The Commissioner finds that Dumfries and Galloway Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in dealing with James G Findlay Ltd's (JGFL's) request for information.

By failing to identify the information requested as environmental information (as defined by regulation 2(1) of the EIRs) and respond to the request accordingly under the EIRs, the Council failed to comply with regulation 5(1) of the EIRs.

However, the Commissioner is satisfied that the Council does not hold any information falling within parts d), e), g) and h) of JGFL's request.

Appeal

Should either JGFL or the 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

23 June 2016

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;

...

13 Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall–

- (a) be given in writing as soon as possible and in any event no later than 20 working days after the date of receipt of the request for the information;
- (b) specify the reasons for the refusal including, as appropriate, any exception under regulation 10(4) or (5) or provision of regulation 11 and how the Scottish public

authority has reached its decision with respect to the public interest under regulation 10(1)(b);

- (c) state the basis on which any exception relied on under regulation 10(4) or (5) or provision of regulation 11 applies if it would not otherwise be apparent;
- (d) if the exception in regulation 10(4)(d) is relied on, state the time by which the authority considers that the information will be finished or completed; and
- (e) inform the applicant of the review provisions under regulation 16 and of the enforcement and appeal provisions available in accordance with regulation 17.

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