

Decision Notice

Decision 136/2014 Mr Gavin Doig and Glasgow City Council

Planning information

Reference No: 201400611

Decision Date: 19 June 2014



Scottish Information
Commissioner

Summary

On 15 November 2013, Mr Doig asked Glasgow City Council (the Council) for specific planning information which had been removed from the Council's website. The Council provided some information while stating that other information was excepted from disclosure under the EIRs as it was an internal communication. Following investigation, the Commissioner found that the Council failed to deal with Mr Doig's request for information in accordance the EIRs, by withholding the information requested by Mr Doig.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (4)(e) (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 15 November 2013, Mr Doig wrote to the Council in relation to planning application 13/02572/DC (Restoration of monument including raising of plinth height, Duke Of Wellington Statue on Queen Street Glasgow) and requested a copy of the original text which had been removed from the Council's website.
2. The Council responded on 3 December 2013, informing Mr Doig that it was dealing with his request under the EIRs. It explained that the report he had referred to was intended to be an internal communication and had been published in error. It applied regulation 10(4)(e) (which relates to internal communications) and 10(4)(d) (for material still in the course of completion, etc.) of the EIRs to withhold the information. The Council further stated that future publication of the completed report would better satisfy the public interest.
3. On 6 December 2013, Mr Doig wrote to the Council requesting a review of its decision. He highlighted why he did not believe these exceptions applied.
4. The Council notified Mr Doig of the outcome of its review on 9 January 2014. It provided Mr Doig with some information and confirmed that the report in question did not form part of the planning application and was submitted and published as part of the application in error. As such, the Council questioned whether the report fell within the scope of Mr Doig's request. If it did, the Council found that it would be excepted from disclosure in terms of regulation 10(4)(e) of the EIRs.
5. On 19 March 2014, Mr Doig 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 specified modifications.

6. The application was validated by establishing that Mr Doig made a request 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 that request.

Investigation

7. On 2 April 2014, the Council was notified in writing that an application had been received from Mr Doig and was asked to provide the Commissioner with any information withheld from him. The Council responded and provided the Commissioner with the withheld information, which was a report bearing the date 2012-2013. The case was then allocated to an investigating officer.
8. The investigating officer carried out some research and was able to obtain another version of the same report on an independent website. This version bore the date 2013-2014 and had a date stamp of 30 October 2013.
9. The investigating officer contacted the Council and drew its attention to where the report had been found online. The Council was asked to confirm whether the report dated 2012-2013, as provided by the Council to the Commissioner, or the one available online with the date 2013-2014, was the report which had been submitted and published with the planning application.
10. The Council responded and confirmed that the report dated 2013-2014, with the date stamp 30 October 2013, was in fact the information published on its website and subsequently withheld by the Council.
11. It is apparent to the Commissioner that this report was published on the Council's website as part of the planning application. Whether or not the report was published in error is irrelevant. The report is clearly the information referred to by the applicant as having been withdrawn from the website and therefore falls within the scope of the request.
12. The investigating officer again wrote to 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, on the basis that the report fell within the scope of Mr Doig's request. The Council was asked justify its reliance on any provisions of the EIRs it considered applicable to the information requested.
13. The Council responded to the effect that it had provided the withheld information to Mr Doig. It further accepted that the information was not excepted in terms of regulation 10(4)(e) of the EIRs.
14. Mr Doig confirmed receipt of the information and that he wished a decision on the matter.

Commissioner's analysis and findings

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

Application of the EIRs

16. It is clear from the Council's correspondence with both Mr Doig and the Commissioner 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 relates to a significant element in Glasgow's built environment and the Commissioner is satisfied that it would fall within either paragraph (a) of the definition of environmental information contained in regulation 2(1) (as information on the state of the elements of the environment) or paragraph (c) of that definition (as information on measures affecting or likely to affect those elements). Mr Doig has not disputed this and the Commissioner will consider the information in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs

17. 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 available when requested to do so by any applicant.
18. 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. In its response to Mr Doig's requirement for review, and initially during the investigation, the Council maintained that the information was exempted from disclosure in terms of regulation 10(4)(e) of the EIRs.

Regulation 10(4)(e) of the EIRs (internal communications)

19. Under regulation 10(4)(e) of the EIRs, a public authority may refuse to make environmental information available to the extent that it involves making available internal communications. In order for information to fall within the scope of this exception, it need only be established that the information is an internal communication. Only if the Commissioner decides that a document is an internal communication will she be required to go on and consider the public interest test.
20. The Commissioner's guidance on the exception under regulation 10(4)(e) of the EIRs¹ draws on the Aarhus Convention Implementation Guide², which (at page 79) specifically states that once information has been disclosed by the public authority to a third party, it cannot be claimed to be an "internal communication".
21. Given that the report in question had been disclosed previously by the Council (i.e. published on its own website) and was, as a matter of fact, available elsewhere online, the Commissioner has concluded that the report could not be considered as an internal communication for the purposes of regulation 10(4)(e) of the EIRs. For that reason, as accepted by the Council during the course of the investigation, the Commissioner does not accept that the exception in regulation 10(4)(e) was correctly applied in this case.
22. As the Commissioner finds that the exception in regulation 10(4)(e) of the EIRs did not apply to the information withheld, she is not required to go on to consider the public interest under regulation 10(1)(b) of the EIRs.
23. The Commissioner therefore concludes that the Council breached regulation 5(1) of the EIRs, by incorrectly applying regulation 10(4)(e) of the EIRs to withhold the information from Mr Doig.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section29/Section29.aspx>

² <http://www.unece.org/env/pp/acig.html>

Decision

The Commissioner finds that Glasgow City Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Doig.

The Commissioner finds that the Council was not entitled to withhold the information on the basis that it was excepted from disclosure under regulation 10(4)(e) of the EIRs. By failing to make the information available, the Council failed to comply with regulation 5(1) of the EIRs.

Given that the information was provided to Mr Doig during the investigation, the Commissioner does not require the Council to take any action.

Appeal

Should either Mr Doig 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.

Margaret Keyse
Head of Enforcement
19 June 2014

Appendix

Relevant statutory provisions

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

...

- (e) the request involves making available internal communications.

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