

Decision Notice



Decision 142/2012 Mr Martin Campbell and City of Edinburgh Council

Works under statutory notices

Reference No: 201200180

Decision Date: 28 August 2012

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Rosemary Agnew

Scottish Information Commissioner

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Summary

Mr Campbell asked the City of Edinburgh Council (the Council) for information about works carried out under statutory notices. The Council told Mr Campbell that it did not hold certain of the information he had asked for, provided some information and withheld other information on the basis that its disclosure might substantially prejudice the outcome of ongoing investigations.

Following an investigation, during which the Council provided Mr Campbell with the information it held, the Commissioner found that the Council was correct to deal with Mr Campbell's request in terms of the EIRs. She accepted that the Council did not hold certain information, but did not accept its reasons for withholding the remaining information.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2), (4)(a) and (5)(b) (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 30 September 2011, Mr Campbell wrote to the Council, requesting certain specified information in relation to works carried out under statutory notices at a specified address.
2. On 1 November 2011, Mr Campbell wrote to the Council, requesting a review on the basis that it had failed to respond to his request for information.



3. The Council notified Mr Campbell of the outcome of its review on 30 November 2011, informing him that it was dealing with his request in terms of the EIRs (and consequently applying section 39(2) of FOISA). It provided him with certain information, subject to the redaction of personal data. The Council also informed Mr Campbell that it did not hold certain other information, responding in terms of regulation 10(4)(a) of the EIRs.
4. In relation to the remaining information requested by Mr Campbell, the Council advised that this was being withheld in terms of regulation 10(5)(b) of the EIRs. This exception relates to the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature.
5. On 20 January 2012, Mr Campbell wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to certain specified modifications.
6. The application was validated by establishing that Mr Campbell had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 8 February 2012, the Council was notified in writing that an application had been received from Mr Campbell and was asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on any provisions of FOISA and the EIRs it considered applicable to the information requested, with specific reference to the requirements of regulations 10(4)(a) and 10(5)(b).
9. On 14 May 2012, the Council informed Mr Campbell that it had reconsidered his request, and provided the information previously withheld in terms of regulation 10(5)(b), subject to the redaction of personal data in terms of regulation 11(2) of the EIRs. Mr Campbell confirmed that he accepted the redactions of personal data; consequently, this information will not be considered further in this decision. However, Mr Campbell believed that the Council should hold more information than had been provided, particularly in relation to cost.



10. The Council was asked to respond to further questions, in particular to explain the steps it had taken to identify and locate the information Mr Campbell had requested. The Council provided submissions in support of its position that no further information was held, and on its application of the EIRs in this case.
11. The relevant submissions obtained from Mr Campbell and the Council will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered the withheld information and the submissions made to her by both Mr Campbell and the Council, and is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

13. It is clear from the Council's correspondence with both Mr Campbell and the Commissioner that it dealt with Mr Campbell on the basis that the information requested was environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns significant external repairs to buildings and the Commissioner is satisfied that it falls within either paragraph (a) or paragraph (c) of the definition of environmental information contained in regulation 2(1) of the EIRs, being information on the state of the elements of the environment, or on measures and activities affecting or likely to affect the state of those elements.

Section 39(2) of FOISA – environmental information

14. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1)) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Council was entitled to apply the exemption to the withheld information, given her conclusion that it is properly classified as environmental information.
15. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exemption and in dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.



Regulation 5(1) of the EIRs

16. 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. 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.
17. 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.
18. Following its review, the Council notified Mr Campbell that it was withholding certain of the information he had requested on the basis that it was excepted from disclosure under regulations 10(5)(b) of the EIRs. It also stated that other information was not held, thus relying upon regulation 10(4)(a) of the EIRs.

Regulation 10(5)(b) of the EIRs

19. Regulation 10(5)(b) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature.
20. In its response to his request for review, the Council informed Mr Campbell that it was withholding the requested information because there was an ongoing investigation into the handling of statutory repair notices. In the circumstances, it believed that the release of the information might prejudice the outcome of such investigations, especially if criminal prosecutions were to arise.
21. As indicated above, during the investigation, the Council disclosed all of the information it held falling within the scope of Mr Campbell's request, subject to the redaction of personal data. Mr Campbell accepted that the Council had been entitled to withhold the personal data, but did not withdraw his application insofar as it related to regulation 10(5)(b).
22. At no stage during the investigation did the Council advise the Commissioner why the information it disclosed during the investigation had previously been withheld in terms of regulation 10(5)(b) of the EIRs. In the circumstances, the Commissioner can only conclude that (in this particular case) the Council was not entitled to withhold the information under regulation 10(5)(b) and in doing so failed to comply with regulation 5(1) of FOISA.



Regulation 10(4)(a) of the EIRs

23. 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.
24. 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 apply if, 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. The Council explained the searches and enquiries it had undertaken with relevant sections and departments in order to identify what information falling within the scope of Mr Campbell's request was held. It provided details of the key words used in searching the relevant electronic records, confirming that relevant paper files had been examined in addition. In the circumstances, having considered these submissions and the terms of Mr Campbell's request, the Commissioner is satisfied that the steps taken by the Council were adequate.
26. In this case the Commissioner is satisfied that the Council did not hold certain of the information requested by Mr Campbell. Consequently, she does not consider there to be any conceivable public interest in requiring that this information be made available. In all the circumstances of this case, therefore, the Commissioner 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.
27. The Commissioner is satisfied, therefore, that the Council was entitled to refuse elements of Mr Campbell's request under regulation 10(4)(a) of the EIRs and in this regard complied with regulation 5(1) of the EIRs.
28. While noting the applicant's outstanding concerns as to the absence of information on costing issues, the Commissioner is satisfied that the Council has now supplied Mr Campbell with all the information it holds falling within the scope of his request (subject to the redaction of personal data in certain cases) and consequently she does not require the Council to take any further action in this case.



DECISION

The Commissioner finds that the City of Edinburgh Council (the Council) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Campbell, in particular by applying section 39(2) of FOISA on the basis that the information requested was environmental information and therefore subject to the EIRs.

The Commissioner also finds that the Council partially failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request. While accepting that certain information was not held, the Commissioner finds that the Council wrongly applied the exception contained in regulation 10(5)(b) of the EIRs to withhold information and thereby failed to deal with the request in accordance with regulation 5(1).

Given the disclosure of the information in the course of the investigation, the Commissioner does not require the Council to take any action.

Appeal

Should either Mr Campbell or the City of Edinburgh Council wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Margaret Keyse
Head of Enforcement
28 August 2012



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
- (b) would be so obliged but for any exemption contained in the regulations.

...



The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

-

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

...

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...

10 Exceptions from duty to make environmental information available–

(1) A Scottish public authority may refuse a request to make environmental information available if-

(a) there is an exception to disclosure under paragraphs (4) or (5); and

(b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.



- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
- (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that
- (a) it does not hold that information when an applicant's request is received;

...

- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

...

- (b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;

...