

Decision Notice



Decision 158/2011 Sirius Sport & Leisure Limited and East Lothian Council

Planning application

Reference No: 201100694

Decision Date: 11 August 2011

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
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Summary

Two requests were made on behalf of Sirius Sport and Leisure Limited (SSL) to East Lothian Council (the Council) for information relating to a specified planning application. The Council provided SSL with information covered by the request, with some parts withheld. Following a review, the Council released the withheld information. However, SSL remained dissatisfied, believing that the Council was likely to hold more information than had been provided, and applied to the Commissioner for a decision.

Following an investigation, the Commissioner accepted that the Council had taken adequate steps to identify, locate and provide all relevant information, and found that no further action was required on the part of the Council in relation to SSL's request. He found that there had been some technical failings in the way in which the Council had dealt with the request, but did not require the Council to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 16(1) and (2) (Refusal of request)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 5(1) (Duty to make environmental information available on request); 13(a), (b) and (c) (Refusal to make 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 28 February 2011, an information request was submitted to the Council on behalf of SSL, seeking information in relation to a particular planning application, specifically:
 - correspondence between the Director of Planning and Council officers
 - correspondence between Councillors and Council officers
 - correspondence between Council officers



- internal correspondence between Councillors
 - notes of meetings and telephone calls involving any of the above
 - briefing papers, or similar, provided to Councillors in advance of the meeting of the full Council held on 22 February 2011.
2. On 3 March 2011, a second request was made to the Council on behalf of SSL, asking for information about two meetings held in November 2007 between SSL and certain named Councillors in relation to the same planning application.
 3. On 29 March 2011, the Council responded to both requests, providing copies of relevant internal emails. It advised that other information about the planning application was accessible through the Council's publication scheme, and was therefore exempt from disclosure under section 25(1) of FOISA.
 4. On the same day, 29 March 2011, the Council was asked to carry out a review of its response. SSL complained that all information identifying the sender or recipient of the emails had been removed, which in its view made the information meaningless. Noting the brevity of what had been released, SSL also queried whether the Council had provided all information covered by its requests. It referred to a particular email which was known to have been sent, but which had not been found among the information provided by the Council.
 5. On 6 April 2011, the Council responded to SSL's request for review. It provided further copies of the correspondence, with the names of Council officials restored. The personal email address of one person was withheld. The Council had also decided that some of the information it had already provided should have been withheld under section 36(1) of FOISA, and redacted this information from the correspondence. Finally, the Council advised that it did not hold the missing email referred to in the request for review.
 6. On 12 April 2011, an application was made to the Commissioner on behalf of SSL, seeking a decision in terms of section 47(1) of FOISA and stating that SSL was dissatisfied with the way in which the Council had dealt with its requests. Three grounds for dissatisfaction were put forward:
 - the fact that information had initially been withheld without any exemptions being cited;
 - the approach of the Council in relation to the missing email;
 - whether the information released was all the information covered by the request.
 7. The application was validated by establishing that SSL had made requests 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 those requests. The case was then allocated to an investigating officer.



Investigation

8. On 26 May 2011, the Council was notified in writing that an application had been received from SSL, given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked to respond to specific questions. These included:
 - whether it agreed that the requests should have been dealt with under the EIRs; and
 - whether it would withdraw its reliance on the exemption in section 36(1) of FOISA, given that the information to which it had been applied had already been disclosed.
9. Enquiries were also made about the searches carried out by the Council in order to identify information covered by the two requests, with reference to the particular concerns expressed by SSL in its application. The Council was asked to consider whether a wider search was necessary.
10. On 14 June 2011, the Council provided the Commissioner with its submission in relation to SSL's application for a decision. The Council provided additional comments and clarification during the investigation, in response to further enquiries from the investigating officer; these are considered in the next part of this decision.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered the submissions made to him by both SSL and the Council and is satisfied that no matter of relevance has been overlooked.
12. While the Council acknowledged that the requested information was environmental information and therefore subject to the EIRs (a conclusion with which the Commissioner agrees), it chose not to apply the exemption in section 39(2) of FOISA. The Commissioner is therefore obliged to consider the Council's handling of the request under both FOISA and the EIRs.

Whether all information has been provided

13. The Council advised the Commissioner that SSL had been given all information held by the Council and falling within the scope of their request.
14. The Council was asked to describe the searches it had undertaken to identify, locate and retrieve information covered by the request. The Council supplied details of the officials involved, the methods of searching, and the records which had been searched. The Commissioner asked for further detail about some of the searches. This information was provided by the Council.



15. After discussion with the investigating officer, the Council carried out some additional searches, but did not identify any more information covered by the terms of SSL's requests. These included an additional search of documents held in the Environment department of the Council. The Council confirmed that it had previously carried out a search of Councillors' "live" and archived emails using a range of search terms to give as wide a return as possible, but that no other correspondence had been found using these search parameters.
16. On the basis of the submissions received from the Council and discussions with Council staff, the Commissioner is satisfied that the Council has identified the likely sources of information relating to the requests from SSL, and has carried out all searches which would be reasonably likely to retrieve information covered by those requests.
17. The Council was asked about the "missing email" of 18 February 2011 (see paragraph 4 above). The Council explained that when it first made enquiries about the email, it was advised that it not been sent using Council systems, and so no further search was undertaken at that point. The Council stated that there was no question of the email being withheld deliberately; the email would have been provided to the applicant if it had been discovered. After it became known that the email had, after all, been sent using Council systems, the Council carried out a full trawl of its IT systems and retrieved the email. No other relevant emails were discovered during this search, despite the use of key word searching which might have been reasonably expected to retrieve any such information.
18. Having considered the Council's submissions, the Commissioner accepts that the Council took adequate steps to identify and locate the "missing email" once it became apparent that it had been sent using its own IT systems. He is not satisfied, however, that it conducted adequate searches for this information, or for the remainder of the requested information, in dealing with SSL's information request or its request for review. In failing to do so, it failed to deal with the request in accordance with section 1(1) of FOISA or regulation 5(1) of the EIRs. Bearing in mind, however, the steps taken subsequently to identify and locate any relevant information, and given that SSL has now received all of the information held by the Council and falling within the scope of its request, he does not require the Council to take any action in relation to these failures.
19. As noted previously, the Council initially dealt with the request under FOISA rather than the EIRs. During the investigation, the Council acknowledged that the information was environmental information (as defined in regulation 2 of the EIRs) and therefore should have been dealt with under the EIRs. It also advised that it did not wish to rely upon any exception in the EIRs in relation to information which it had considered to be exempt under section 36(1) of FOISA, but which was released to the applicant in response to the initial request, or in relation to certain other information subsequently released to the applicant. Given the terms of SSL's application (see paragraph 6 above), the Commissioner does not, in any event, find it necessary to consider the application of any exemptions/exceptions to the information requested.



Refusal notice

20. In its application for a decision, SSL asked the Commissioner to investigate the lack of justification provided by the Council in relation to its original decision to withhold certain information; in particular, the failure to cite relevant exemptions, except in respect of information otherwise available in the planning file.
21. Section 16(1) of FOISA stipulates that if a Scottish public authority intends to refuse to disclose information in response to an information request, claiming any of the exemptions in Part 2 of FOISA, it must provide the applicant with certain information about that decision. In particular, the authority must disclose that it holds the information requested, state that it considers the information to be exempt from disclosure, indicate which exemption is considered to apply and state why that exemption applies (with consideration of the public interest test, where applicable).
22. The Commissioner finds that the Council's response of 29 March 2011, while clearly withholding certain information relating to senders and recipients of communications and presumably doing so because the information was considered to be exempt, failed to state that the withheld information was considered to be exempt from disclosure under FOISA, or to indicate which exemption was considered to apply, and why. The review response (6 April 2011) cited the exemption in section 36(1) in relation to some information, but did not cite any other exemption, although the Council later confirmed that it had removed one email address on the grounds that it was personal data (subsequently deciding that this should be provided). The Commissioner has noted the Council's failure to comply with the requirements of section 16(1) of FOISA, but (noting in particular that no information remains withheld from the applicant) has not required the Council to take any further action on this occasion.
23. Similarly, when the matter is considered under the EIRs, the Commissioner finds that, for the reasons listed above, the Council failed to comply with regulation 13 (which makes similar provision to section 16 of FOISA – the relevant paragraphs are reproduced in the Appendix) in failing to provide certain information in its refusal notices. Again, the Commissioner has noted this failure but has not required the Council to take any further action on this occasion.



DECISION

The Commissioner finds that East Lothian Council (the Council) failed to comply fully with Part 1 (and in particular section 1(1)) of FOISA in responding to the information requests from Sirius Sport & Leisure Limited, in failing to take adequate steps to identify and locate all information covered by these requests. The Council also failed to comply with section 16 of FOISA when responding to the requests.

The Commissioner also finds that the Council failed to comply fully with the EIRs, and in particular regulation 5(1), in failing to identify the requested information as environmental information and thereafter take adequate steps to identify and locate all information covered by the applicant's requests. The Council also failed to comply with regulation 13 of the EIRs when responding to the requests.

As the Commissioner is satisfied that the Council has now provided all information covered by the requests, he does not require the Council to take any further steps in relation to this matter.

Appeal

Should either Sirius Sport & Leisure Limited or East Lothian 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 notice.

Margaret Keyse
Head of Enforcement
11 August 2011



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.

...

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-
- (a) discloses that it holds the information;
 - (b) states that it so claims;
 - (c) specifies the exemption in question; and
 - (d) states (if not otherwise apparent) why the exemption applies.
- (2) Where the authority's claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information

...



The Environmental Information (Scotland) Regulations 2004

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.

...

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;

...