

Decision Notice

Decision 174/2017: Mr David Telford and North Ayrshire Council

Cost plan payment: Ladies' Walk, Fairlie

Reference No: 201701196

Decision Date: 17 October 2017



Scottish Information
Commissioner

Summary

The Council was asked for information explaining how a specified payment related to one of its planning policies, specific to a housing development at Ladies' Walk in Fairlie.

The Council considered the request under the EIRs, providing some information, but concluding that it did not hold anything further. Following investigation, the Commissioner accepted this.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (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)

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. Policy RES3 (previously RES2B) forms part of North Ayrshire Council's Local Development Plan¹. It is a site-specific policy for Kelburn Castle, Fairlie, providing for a housing development and subsequent programme of restoration and maintenance for Kelburn Castle, and improvements to the Country Centre there.
2. The policy provides that any permitted development is subject to an appropriate Section 75 Agreement, to ensure that monies are only used for the works to Kelburn Castle and the Country Centre described above.
3. On 17 May 2017, Mr Telford made a request for information to North Ayrshire Council (the Council) as follows:

I refer to your email of 21st February 2017, with which you kindly enclosed Cost Plan and Cash Flow details pertaining to NAC Council Policy RES2B/RES3. In the spread sheet entitled "Business Cash Flow - Policy RES2B", there is a reference to a £700,000 payment to a "Robert Ryan". I will be most grateful if you will provide an explanation and the details of how this particular payment is relevant to Policy RES2B/RES3?
4. The Council responded on 7 June 2017, having considered the request under the EIRs. It provided explanatory information obtained from the developer following the request, confirming that it held no further information falling within the scope of his request.
5. On 8 June 2017, Mr Telford wrote to the Council requesting a review of its decision. He noted that the response did not identify the area of ground to which the payment related, or provide details of the various transactions which led to this land acquisition. He also suggested that further information should be available to the Council, given that it should be

¹ <http://www.north-ayrshire.gov.uk/resident/planning-and-building-standards/local-development-plan.aspx>

known to the RES 2B/RES 3 Trust, of which Council officers and elected Councillors were members.

6. The Council notified Mr Telford of the outcome of its review on 6 July 2017. It upheld its initial decision and confirmed that it was relying on regulation 10(4)(a) of the EIRs to support its position that it did not hold any relevant information.
7. On 7 July 2017, Mr Telford wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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. Mr Telford stated he was dissatisfied with the outcome of the Council's review because he believed further information should be held by the Council: he suggested that it was inconceivable that it would not hold information on the ownership and disposal of land he considered critical to Policy RES 2B/RES 3.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mr Telford made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision. It was also explained to Mr Telford that the investigation could not cover the scope of the new request that he made in his review requirement of 8 June 2017, and Mr Telford accepted this.
9. On 11 August 2017, the Council was notified in writing that Mr Telford had made a valid application and the case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions. These focussed on the searches carried out to identify and locate any information held by the Council that fell within the scope of Mr Telford's request.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both Mr Telford and the Council. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

12. It is clear from the Council's correspondence with both Mr Telford and the Commissioner that any information falling within the scope of this request would be environmental information, as defined in regulation 2(1) of the EIRs. Mr Telford has asked for information regarding a land transaction relating to a proposed housing development. As such, the Commissioner is satisfied that it would fall within paragraphs (a) and (c) of the definition of environmental information (reproduced in Appendix 1).
13. Mr Telford has not disputed the Council's decision to handle the request under the EIRs. Accordingly, the Commissioner will consider the information in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs

14. Regulation 5(1) of the EIRs, subject to the various qualifications contained in regulations 6 to 12 (regulation 5(2)(b)), requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
15. A Scottish public authority applying any of the exceptions under regulation 10 of the EIRs must interpret them in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
16. In this case, the Council relied on the exception in regulation 10(4)(a) of the EIRs in relation to Mr Telford's request.

Regulation 10(4)(a)

17. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when the applicant's request is received.
18. The standard of proof in considering whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held. While it may be relevant as part of this exercise to explore what information should be held, ultimately the Commissioner's role is to determine what relevant information is (or was, at the time the request was received) held by the public authority.

Submissions from Mr Telford

19. Mr Telford believed it to be incomprehensible that the Council would introduce Policy RES2B/RES3 into its Local Development Plan without having the information of who owned the land critical to the Policy. He did not believe the Council could have had no information as to when and where the land might then have been sold, by whom and to whom, and whether such a sale (or multiple sales) took place before or after Policy RES2B/RES3 was introduced.
20. Mr Telford argued that when compared to the original Cost Plan for Policy RES2B/RES3, the most current information provided by the Council appeared to indicate that the Developer's profit had increased and the community benefit sum had decreased. He asserted that the Council must hold further detailed information as to how this could be rationalised or linked to the land acquisition sum referred to in his request.
21. The investigating officer asked Mr Telford if he could clarify what type of further information he believed the Council might hold falling within the scope of his request. Mr Telford provided the Commissioner with a copy of an email that he had sent to the Council previously, which in his view demonstrated why it was critical that the £700,000 payment should be fully explained.
22. In this email, he stated that in the site developer's planning application submission of 15th August 2017, it was stated that the Ladies' Walk site was privately owned entirely by Dawn

Homes Limited. He stated that this made no sense because, under Policy RES3, the land had to be owned by the owner of Kelburn Castle and Country Centre. Mr Telford stated that land ownership could only transfer on the sale of the completed houses and that this was confirmed by the revised Cost Plan, lodged as a document under the consent for the first phase of housing under Policy RES3. Mr Telford stated that this Cost Plan confirmed there would be a nil cost for land acquisition under Policy RES3.

23. Mr Telford's email stated that he found this to be logical because all of the excess profit from the sale of the houses needed to be used for the community benefit described within Policy RES3. He submitted that outwith the terms of Policy RES3, the Ladies' Walk site was simply agricultural land and of very little value. He stated that manoeuvring an artificial pre-sale of the land, at a cost only appropriate for valuable housing plots, would allow the excess profit from the sale of the houses to be passed directly to the original land owner and at the same time would remove from the monies available for the controlled and audited renovation of Kelburn Castle, that being the sole purpose of Policy RES3.
24. The Commissioner would emphasise that the views expressed in the two preceding paragraphs are Mr Telford's alone. The Commissioner notes that Mr Telford has not identified any specific additional information he believes should be held by the Council, in addition to that referred to in his review request and his application (see above).

Submissions from the Council

25. The Council submitted that as Mr Telford had specifically stated in his request that he required information about the payment to Robert Ryan contained within the Cost Plan, it was logical to search for information about the Cost Plan and the payment to Robert Ryan.
26. The Council noted that it had already provided Mr Telford with email confirmation (obtained from the developer following his request and therefore not strictly falling within the scope of the request) that the payment in question was a land acquisition cost in respect of ground acquired from Robert Ryan Timber Engineering Limited. This was in addition to Cost Plan information disclosed earlier.
27. The Council explained that the ownership of the ground and the planning application were two separate things. The Section 75 Agreement had to be with the owner of the ground, as it confirmed it was in this case. The Land Certificate exhibited for the site disclosed that there was a security by Dawn Homes (the applicant) in favour of Robert Ryan Timber Engineering Limited. The Council stated that it did not know, and still did not know, what that was for.
28. The Council stated that it was not a matter for it to know what transactions led to this land acquisition, only that the party entering into the planning agreement was the registered owner. The Council submitted that there would be no reason for it to hold a record of any such transactions.
29. With regard to the email referred to by Mr Telford in his submissions, the Council stated that this had been sent in response to the application for planning permission for Phase 2 of the development at Ladies Walk. The Council explained that Mr Telford had asked for receipt of the email to be acknowledged and for it to be lodged as an objection on the Council's planning website. The Council confirmed that the email had been logged as an objection and was publicly visible on the website. It did not comment further on its relevance to the current application.
30. The Council stated that it had searched for the information with reference to the Cost Plan and Robert Ryan. It confirmed that it had carried out searches within its Planning Service, its

Property Management and Investment Service and its Legal Section, explaining that these would be the areas where any further information, if held, would necessarily be located. The Council searched both electronically and in paper files. All of the information identified in these searches had already been disclosed to Mr Telford.

31. The Council provided the Commissioner with a screenshot of internal emails confirming the conclusion that no further information was held.

The Commissioner's conclusions

32. Having considered all the relevant submissions and the terms of the request, the Commissioner is satisfied that the Council took adequate, proportionate steps to establish whether it held any information falling within the scope of Mr Telford's request. He accepts that any information relevant to the request would have been identified using the searches described by the Council.
33. The Commissioner can only consider what information is actually held by the Council, and not information it should hold, whether because the applicant believes it should do so or for any other reason. It is not for the Commissioner to determine whether the Council should have obtained information concerning the land acquisition in question, or any transactions leading to that acquisition, or whether any aspect of these transactions should be considered a potential breach of Policy RES3 or the Section 75 Agreement. The Commissioner would observe, however, contrary to the concerns expressed by Mr Telford, that Policy RES3 appears to be silent as to who should own the development site, or any part thereof, at any particular time. This is consistent with the Council's submissions, to the effect that this is not generally a concern of the planning system.
34. Taking all of the above into consideration the Commissioner is satisfied that, on the balance of probabilities, the Council does not (and did not, on receiving the request), hold any information falling within the scope of Mr Telford's request.

Public interest test

35. The exception in regulation 10(4)(a) of the EIRs is subject to the public interest test in regulation 10(1)(b) of the EIRs and so can only apply if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in making the information available.
36. In this case, for the reasons set out above, the Commissioner is satisfied that the Council does not (and did not, on receiving the request) hold any information covered by Mr Telford's request. Consequently, he accepts that there is no conceivable public interest in requiring the disclosure of such information and finds that the public interest in making information available is outweighed by that in maintaining the exception.
37. The Commissioner therefore finds that the Council was correct to refuse Mr Telford's request under regulation 10(4)(a) of the EIRs.

Decision

The Commissioner finds that North Ayrshire Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr Telford.

Appeal

Should either Mr Telford or North Ayrshire 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

17 October 2017

Appendix 1: Relevant statutory provisions

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

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(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;

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info