

Decision Notice



Decision 185/2011 Mr John Young and South Lanarkshire Council

Equalities Impact Assessment

Reference No: 201101224

Decision Date: 15 September 2011

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

Kinburn Castle

Doubledykes Road

St Andrews KY16 9DS

Tel: 01334 464610



Summary

Mr Young asked South Lanarkshire Council (the Council) to provide information about an Equalities Impact Assessment (EIA) relating to the decision to use incineration as the Council's preferred means of addressing the issue of landfill. The Council responded by giving Mr Young notice that it did not hold the information he was seeking. Following a review, the Council confirmed that it did not hold the information, while advising that it had also dealt with the request under the Environmental Information (Scotland) Regulations (the EIRs). Mr Young remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner was satisfied that the Council did not hold any information falling within the scope of Mr Young's request, and that it had complied with both Part 1 of FOISA and with the EIRs in dealing with Mr Young's request.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement) and 17(1) (Notice that information is not held)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a) to (c) of "environmental information") and 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 the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 18 June 2011, Mr Young wrote to the Council requesting the following information:
"...a copy of the Council's EIA in regards to the decision to use incineration as its preferred means (technology) of addressing the issue of landfill in South Lanarkshire, including all the evidence collated in making that assessment and a record of the consultation that took place in coming to that decision in line with the Equalities Act 2010."



2. The Council responded on 24 June 2011. It advised Mr Young that it could not provide the information he had asked for, because it did not have it. The Council stated that it had not made any decision to use incineration as its preferred means of addressing the issue of landfill, and an EIA had not been produced at that stage. The Council gave notice, in terms of section 17 of FOISA, that it did not hold the information.
3. Later on the same day, 24 June 2011, Mr Young requested a review of the Council's response. It was his understanding that the Council had issued a tender on the matter in question, and that therefore a decision must have been taken to use incineration as the preferred means of reducing landfill. He believed that the Council had a responsibility to carry out an EIA in respect of such decisions before issuing a tender.
4. On 5 July 2011, the Council issued its review response to Mr Young. As a consequence of the review, it had decided that the request was for environmental information and therefore should have been dealt with under the EIRs as well as FOISA. The Council confirmed its reliance upon section 17 of FOISA, and also gave notice that it was relying upon the exception in regulation 10(4)(a) of the EIRs. The Council gave reasons for its decision.
5. On 6 July 2011, Mr Young wrote to request a decision from the Commissioner, 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. Mr Young explained why he believed that the Council had a legal duty to undertake the EIA which was the subject of his request.
6. The application was validated by establishing that Mr Young 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. The case was allocated to an investigating officer.

Investigation

7. On 1 August 2011, the investigating officer notified the Council that an application had been received from Mr Young and invited it to provide any comments it wished to make on the application, as required by section 49(3)(a) of FOISA. The Council was asked to provide the following information:
 - Excerpts from the tender or pre-tender documentation which would show that the waste disposal contract currently out to tender did not specify the disposal method to be employed;
 - Information about the Council's current policy on waste management and disposal;
 - Comments on whether the Council had a legal obligation to carry out an EIA to assess the impact of the decision to reduce landfill, or, as worded in Mr Young's initial request, an EIA on the decision to use incineration as the preferred means of addressing the issue of landfill.



8. On 12 August 2011, the Council provided its response. The information provided by the Council, insofar as relevant, is considered in the next part of this decision.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mr Young and the Council and is satisfied that no matter of relevance has been overlooked.

Whether the information was held

10. In his application to the Commissioner, Mr Young explained why he believed that the Council had taken a decision to make incineration its preferred method of reducing landfill. He noted that the Council had approved an application for the construction of an incineration plant at Dovesdale, Stonehouse. He understood that the Council was currently seeking bidders for a tender for the removal of landfill waste through the use of incineration. Mr Young believed that the Council was required by law to undertake an EIA prior to making such policy decisions.
11. The Council stated that it had not taken any decision to use incineration as the preferred means of reducing landfill. In the absence of such a decision, it did not believe an EIA to be required.
12. The Council provided the Commissioner with the Outline Specification from the pre-tender documentation for the contract for Sustainable Waste Management: Treatment and Disposal of Residual Waste (Reference CM/ES/09/04), which contains a statement of the Council's service requirements in relation to this contract (the contract referred to in Mr Young's submissions), and which has already been provided to Mr Young. Paragraph 1.4 of this document states:
- "Responses from contractors may offer any range of waste management facilities and practices, provided that it can be demonstrated that they are fully capable of meeting the Council's aims, objectives and targets..."
- One of the overall service objectives is later stated as being to "meet or exceed landfill diversion targets" (paragraph 2.1.4.2).
13. The Commissioner accepts that the Outline Specification provides evidence that potential contractors have not been advised that incineration is the Council's preferred means of reducing the amount of waste sent to landfill sites. The Commissioner also examined the Descriptive Document (Pre-Qualification Stage) relating to the same tender, and again found that it did not specify a preferred means of waste disposal, or mention incineration.
14. The Council also provided a copy of a report presented to its Executive Committee on 18 November 2009, with the title "Procurement Process for the Treatment and Disposal of Residual Waste". Paragraph 6.3 of this report states:



“Taking account of all the requirements, Committee is asked to endorse an outcome-based solution to enable the Council to meet its targets rather than specify a specific technological solution.”

15. The Commissioner accepts this as further evidence that the Council has not made a decision to favour one technology over another, in relation to reducing landfill.
16. Paragraph 8.2 of the above-mentioned report states that no EIA was considered necessary, as the report did not introduce a new policy, function or strategy, or recommend a change to an existing policy, function or strategy.
17. The Council confirmed that it required its employees to undertake EIAs where a proposal introduced a new, or amended an existing, policy, procedure, strategy or function of the Council. It did not consider that the acceptance of any particular method of disposal to reduce landfill would necessarily require an EIA: this could only be determined once a particular proposal had been settled upon.
18. Based on the above evidence, the Commissioner accepts that the Council does not (and could not, in all the circumstances, be expected to) hold any information about an EIA falling within the scope of Mr Young’s request.

EIRs or FOISA?

19. As noted previously, when the Council reviewed its response to Mr Young’s request it decided that the request was for environmental information, as defined in regulation 2 of the EIRs. It proceeded to deal with Mr Young’s request under both FOISA and the EIRs.
20. The Commissioner accepts that if the Council had held the information requested by Mr Young, it would have been environmental information as defined in regulation 2 of the EIRs, for the reasons put forward by the Council in its review response of 5 July 2011.
21. As set out in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*, the Commissioner’s view is that when a written request for information is received by a public authority, it comes under the scope of section 1 of FOISA whether or not it is for environmental information, given the wide definition of "information" contained in section 73 of FOISA, i.e. "information recorded in any form". The definition does not exclude environmental information.
22. However, if the information falls within the definition of environmental information, authorities have both an obligation and an option. They have the obligation of dealing with the request under the EIRs and they have the option of claiming the exemption at section 39(2) of FOISA, which means they do not, at the same time, have to respond to the request under FOISA.
23. In this case, the Council chose not to claim the exemption at section 39(2) of FOISA, and was therefore obliged to consider Mr Young’s request under both FOISA and the EIRs, which it has done.



Section 17(1) of FOISA

24. Section 17(1) of FOISA states that where a Scottish public authority receives a request for information which it does not hold, it must give the applicant notice in writing that it does not hold the information. The Commissioner is satisfied that the Council correctly provided such notice to Mr Young in its letters of 24 June 2011 and 5 July 2011.

Regulation 10(4)(a) of the EIRs

25. 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.
26. 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. 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.
27. In this case, as indicated above, the Commissioner is satisfied that the Council did not hold the information requested by Mr Young. Consequently, he does not consider there to be any conceivable public interest in requiring that any information be made available. The Commissioner therefore concludes that, in all the circumstances of this case, 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.
28. The Commissioner is satisfied, therefore, that the Council was entitled to refuse Mr Young's request under regulation 10(4)(a) of the EIRs.

DECISION

The Commissioner finds that South Lanarkshire Council (the Council) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request from Mr Young. The Council provided notice that the requested information was not held, in accordance with section 17(1) of FOISA.

The Commissioner finds that the Council complied with the Environmental Information (Scotland) Regulations 2004 in refusing Mr Young's request under regulation 10(4)(a).



Appeal

Should either Mr Young or South Lanarkshire 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
15 September 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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...



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;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (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;

...

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;

...