

Decision Notice



Decision 186/2012 Mrs Julie Ward and North Lanarkshire Council

Failure to respond to requirement for review

Reference No: 201201299

Decision Date: 20 November 2012

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Rosemary Agnew
Scottish Information Commissioner

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Summary

This decision considers whether North Lanarkshire Council (the Council) complied with the technical requirements of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to an information request made by Mrs Julie Ward.

Background

1. Following correspondence with the Council dating from March 2011, on 15 February 2012, Mrs Ward wrote to the Council requesting certain specified information (broadly, information relating to a complaint about alleged breaches of building control and environmental protection legislation). Mrs Ward specified a timescale for the information she wished to see (from 1 February 2011 to date) and indicated that she would prefer to inspect the information at the Council's offices.
2. The Council responded on 17 February 2012, explaining that Mrs Ward could attend the Council's offices to view a redacted, electronic version of the information she requested, or that a redacted paper copy of the information could be sent to her (the latter at cost, as had previously been explained by the Council).
3. Mrs Ward then responded on 17 February 2012 asking for a hard copy of the information and stating that she would collect this from the Council, at which time she would pay the required fee.
4. On 21 February 2012, the Council emailed Mrs Ward. It attached a fees notice, in terms of regulation 8 of the EIRs, for the provision of the requested information.
5. On 27 February 2012, Mrs Ward collected the information from the Council and paid the fees notice. The Council provided Mrs Ward with what it considered to be the relevant information, subject to the redaction of personal data in terms of regulation 11 of the EIRs.



6. On 27 February 2012, Mrs Ward wrote to the Council expressing dissatisfaction. She stated that there appeared to be “a considerable amount of action events missing.” Mrs Ward then listed the information she would have expected the Council to hold, and therefore to have provided to her in response to her request. The information listed was based on Mrs Ward’s records of her dealings with the Council. Mrs Ward also referred to the “more pressing issue” of the large volume of redactions from the information provided. Mrs Ward requested a new copy of the information without the redactions, although she accepted that personal data could remain redacted.
7. The Council responded on 5 March 2012. It supplied a further copy of the information, adjusted to exclude only personal data in terms of regulation 11 of the EIRs. The Council also explained that no further information was held in respect of the points Mrs Ward had listed. It also supplied a payment receipt.
8. On 5 March 2012, Mrs Ward wrote to the Council expressing further dissatisfaction. She believed relevant information had still not been provided and sought an explanation of why this was the case.
9. The Council responded on 6 March 2012, stating that there was no provision in FOISA or the EIRs for explanations, advice or views.
10. On 8 August 2012, Mrs Ward wrote to the Commissioner’s Office, stating that she was dissatisfied with the Council’s failure to carry out a 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.
11. The application was validated by establishing that Mrs Ward 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 (see below). The case was then allocated to an investigating officer.

Investigation

12. On 11 September 2012, the Council was notified in writing that an application had been received from Mrs Ward and was invited to comment on the application.
13. The Council responded on 21 September, and again on 10 October 2012, having been asked to clarify certain points by the investigating officer. Its submissions, insofar as relevant, are considered fully in the Commissioner’s analysis and findings below.



Commissioner's analysis and findings

14. In *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹ the Commissioner confirmed (at paragraph 51) that where environmental information is concerned, there are two separate statutory frameworks for access to that information and, in terms of the legislation, an authority is required to consider the request under both FOISA and EIRs.
15. This decision is concerned only with the Council's compliance with the statutory timescale for responding to the Mrs Ward's requirement for review. Having considered the terms of Mrs Ward's request, the Commissioner considers it likely that any information falling within its scope would properly be considered environmental information under the EIRs (see Appendix below for the full definition). In any event, the Council purported to deal with the request under the EIRs, although it did not apply the exemption in section 39(2) of FOISA. In the circumstances, the Commissioner has considered the technical matters raised by this case in terms of both FOISA and the EIRs.
16. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review, subject to certain exceptions which are not relevant in this case. In respect of environmental information, the same timescale is laid down by regulation 16(4) of the EIRs.
17. Regulation 16(1) of the EIRs provides that, subject to paragraph (2), an applicant may make representations to a Scottish public authority if it appears to the applicant that the authority has not complied with any requirement of the EIRs in relation to the applicant's request.
18. The Council submitted that nothing in Mrs Ward's correspondence comprised a request for review in terms of regulation 16 of the EIRs.
19. During the investigation, the investigating officer invited the Council to explain in what respects Mrs Ward's email to the Council of 27 February 2012 failed to meet the requirements of regulation 16 of the EIRs, bearing in mind the provisions of paragraphs 5.2 and 5.3 of the Scottish Ministers' Code of Practice on the discharge of functions under FOISA and the EIRs (the Code²).
20. Paragraph 5.2 of the Code provides:
If, when notifying the applicant of their right to a review, the public authority has told them where they should direct a request for review, the public authority may reasonably expect those instructions to be followed. However, where an applicant fails to follow that procedure and sends the review request to the incorrect person and/or address, that does not invalidate the review request (provided the requirements of section 20(3) of FOISA are met). In such circumstances, the 20 working day period starts when the review request is first received by the authority so, if that person/address is in the correct public authority, they should forward the review request to the correct person/address as soon as possible.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>

² <http://www.scotland.gov.uk/Resource/Doc/933/0109425.pdf>



21. Paragraph 5.3 of the Code provides:

If an applicant writes to the authority expressing dissatisfaction with the way in which the authority has dealt with their request, the authority should treat this as a formal request for review, provided it meets the requirements of section 20(3) of FOISA. The applicant does not need to specifically ask for a review. They do, however, need to specify why they are dissatisfied with the original decision in order for the review request to be valid. If this is not clear, or the request fails in any way to comply with s.20(3)(c) of FOISA or regulation 16 of the EIRs, whichever is appropriate, the authority has a duty to advise and assist the applicant in making a valid review request. The statutory 20 days timescale will not begin until a valid review request is made.
22. The Council submitted to the Commissioner that Mrs Ward's email of 27 February had been dealt with as a request for clarification of the information provided in the course of correspondence with her. The Council considered it reasonable to expect that if Mrs Ward had been dissatisfied with its response of 5 March 2012 to her, she would have notified the Council of this at that point in terms of regulation 16 of the EIRs. The Council's letter of 23 February 2012, provided to Mrs Ward on collection, had informed her of her rights under regulations 16 and 17 of the EIRs.
23. Mrs Ward's email of 27 February made representations to the Council that she had not received all the information requested, and expressed her dissatisfaction at this ("I regret to advise you that there appears to be a considerable amount of action events missing"). By implication, her representation was that the Council had not complied with its duty in terms of regulation 5(1), that is (subject to regulation 5(2)) that a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant. Mrs Ward listed the information she would have expected to have received from the Council in response to her information request, and which she had not received.
24. It must be acknowledged, as the Council stated, that Mrs Ward also stated that "this missing information is not necessarily a problem"; nonetheless she pointed out that it raises a concern about the accuracy of the Council's records.
25. Mrs Ward also drew the Council's attention to her dissatisfaction that a large volume of the information had been redacted, and indicated she wished a copy without these redactions.
26. The Commissioner is satisfied that Mrs Ward's email of 27 February 2012, in which she drew the Council's attention to the fact that she had not received all the information requested, in terms of both not receiving information she expected to be held and the redaction of information from that supplied, constituted a request for review for the purposes of both section 20(3) of FOISA and regulation 16(1) and (2) of the EIRs. Quite clearly, it expresses dissatisfaction with the Council's response and expects the Council to review what it has provided.



27. While the responses given by the Council to Mrs Ward may have had the purpose of assisting Mrs Ward and being helpful, the Commissioner is not satisfied that any of the Council's subsequent correspondence with Mrs Ward can be accepted as an adequate response to her requirement for review of 27 February 2012. In the circumstances, the Commissioner does not consider that the Council provided a response to that requirement for review, or that it carried out a review meeting the requirements of either section 21 or regulation 16, within the respective timescales required by section 21(1) of FOISA and regulation 16(4) of the EIRs.
28. In response to the point made by the Council - that if Mrs Ward had been dissatisfied with its response of 5 March 2012, it would have been reasonable to expect her to notify it of this at that point in terms of regulation 16 of the EIRs – the Commissioner notes that Mrs Ward did notify the Council on 5 March 2012 that she was still dissatisfied. The Commissioner is also of the view that Mrs Ward's email of 5 March 2012 also has the essential characteristics of a requirement for review in terms of regulation 16 of the EIRs. On neither occasion was anything meeting the essential requirements of a review carried out.
29. The Commissioner would also point out that the statement the Council made in response to the email of 5 March – that the legislation “gives no rights for the provision of explanations, advice or views” – appears unduly restrictive, given the duties to provide reasonable advice and assistance in section 15 of FOISA and regulation 9 of the EIRs.
30. Since the Council did not provide a response to Mrs Ward's requirement for review within 20 working days (and, indeed, has not done so yet), the Commissioner finds that it failed to comply with section 21(1) of FOISA and regulation 16(4) of the EIRs.

DECISION

The Commissioner finds that North Lanarkshire Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and with the Environmental Information (Scotland) 2004 (the EIRs) in dealing with the information request made by Mrs Ward. In particular, the Council failed to respond to Mrs Ward's requirement for review within the timescale laid down by section 21(1) of FOISA and regulation 16(4) of the EIRs.

The Commissioner therefore requires the Council to comply with Mrs Ward's requirement for review, in accordance with the requirements of section 21 of FOISA and regulation 16 of the EIRs, by 6 January 2013.



Appeal

Should either Mrs Ward or North 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.

Margaret Keyse
Head of Enforcement
20 November 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.

...

20 Requirement for review of refusal etc.

- (1) An applicant who is dissatisfied with the way in which a Scottish public authority has dealt with a request for information made under this Part of this Act may require the authority to review its actions and decisions in relation to that request.
- (2) A requirement under subsection (1) is referred to in this Act as a "requirement for review".
- (3) A requirement for review must-
- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify-
 - (i) the request for information to which the requirement for review relates; and
 - (ii) the matter which gives rise to the applicant's dissatisfaction mentioned in subsection (1).
- (4) For the purposes of paragraph (a) of subsection (3) (and without prejudice to the generality of that paragraph), a requirement for review is treated as made in writing where the text of the requirement is as mentioned in paragraphs (a) to (c) of section 8(2).

...



21 Review by Scottish public authority

(1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

(4) The authority may, as respects the request for information to which the requirement relates-

(a) confirm a decision complained of, with or without such modifications as it considers appropriate;

(b) substitute for any such decision a different decision; or

(c) reach a decision, where the complaint is that no decision had been reached.

(5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

...

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;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

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)-
 - (a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and
 - (b) is subject to regulations 6 to 12.

...

16 Review by Scottish public authority

- (1) Subject to paragraph (2), an applicant may make representations to a Scottish public authority if it appears to the applicant that the authority has not complied with any requirement of these Regulations in relation to the applicant's request.
- (2) Representations under paragraph (1) shall be made in writing to the Scottish public authority no later than 40 working days after either the date that the applicant receives any decision or notification which the applicant believes does not comply with these Regulations or the date by which such a decision or notification should have been made, or any other action should have been taken, by the authority but was not made or taken.
- (3) The Scottish public authority shall on receipt of such representations-
 - (a) consider them and any supporting evidence produced by the applicant; and



- (b) review the matter and decide whether it has complied with these Regulations.
- (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.
- (5) Where the Scottish public authority decides that it has not complied with its duty under these Regulations, it shall immediately take steps to remedy the breach of duty.