

Decision Notice



Decision 189/2013 Mr Jim Gault and Scottish Borders Council

Halmyre Loan Development

Reference No: 201300072

Decision Date: 22 August 2013

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Rosemary Agnew

Scottish Information Commissioner

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Summary

On 10 August 2012, Mr Gault asked Scottish Borders Council (the Council) for information relating to a specified development. The Council provided some information, stating that other information could be inspected at Council premises.

Following an investigation, the Commissioner found that the Council had failed to deal with Mr Gault's request for information in accordance with the EIRs, by failing to identify and provide all the information it held when responding to Mr Gault's request. She required the Council to conduct further searches to satisfy her that it held no further information falling within the scope of Mr Gault's request. Where further information was identified, the Commissioner required the Council to provide this information to Mr Gault or provide an appropriate response under regulation 13 of the EIRs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (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) (paragraphs (a) and (c) of definition of "environmental information"); 5(1), (2)(b) and (3) (Duty to make available environmental information on request); 6(1)(a) (Form and format of information); 9(2) (Duty to provide advice and assistance) and 13 (Refusal to make information available)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. Both Appendices form part of this decision.

Background

1. On 10 August 2012, Mr Gault wrote to the Council requesting information about a development at Halmyre Loan, Romannobridge. Mr Gault's request is set out in full in Appendix 2.
2. The Council sought clarification of Mr Gault's request on 22 August 2012, specifically as to the location of the "burn" and "culvert" point 2 of his request referred to.



3. On the same day, Mr Gault provided the Council with the clarification required to identify the “culvert” and “burn”.
4. The Council responded to Mr Gault’s request on 4 September 2012. The Council supplied Mr Gault with information falling within the scope of his request.
5. On 11 September 2012, Mr Gault wrote to the Council requesting a review of its decision. He highlighted categories of information he believed to be missing from the Council’s response.
6. On 29 November 2012, the Council contacted Mr Gault and asked him to identify, on a plan supplied, the properties he was seeking information on.
7. Mr Gault responded on the same day, clarifying that he sought all information on the Halmyre Loan development (properties 1-14) and all correspondence that had taken place between the Council, the land owners and the developers, including the road developer.
8. The Council notified Mr Gault of the outcome of its review on 10 December 2012. It confirmed that further searches for information had uncovered planning application information held on CD, which would be made available to Mr Gault by way of inspection at the Council’s offices, “... thus safeguarding against copyright issues”.
9. With respect to information relating to the works undertaken at the burn (point 2 of the request), Mr Gault was informed that “evaluation was still underway in the Environment & Infrastructure department for the best options relation to the situation.”
10. On 9 January 2013, Mr Gault 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.
11. The application was validated by establishing that Mr Gault made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

12. On 7 February 2013, the Council was notified in writing that an application had been received from Mr Gault 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.



13. 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 or the EIRs it considered applicable to the information requested.
14. In his application to the Commissioner, Mr Gault expressed dissatisfaction that he was required to inspect the information at the Council premises. He provided the Commissioner with reasons why this proposal was not suitable for him. He also believed he had not been provided with all the information held by the Council and falling within the scope of his request.
15. The Council supplied the Commissioner with five CDs containing information which was “withheld” from Mr Gault. The Council informed the Commissioner that it had exhausted all possible means of searches, which included a search of the Local Area office and searches conducted by the Council’s IT department, but was unable to locate two further CDs, containing information on plots 7 and 9 Halmyre Loan. The Council stated that these CDs might have been lost in office moves.
16. The Council also supplied hard copies of information relating to the plots at Halmyre Loan.
17. During the investigation, the Council agreed to provide Mr Gault with hard copies of the information contained on the CDs referred to above. On receipt of this information, Mr Gault provided the Commissioner with specific examples of information he considered to be missing from the Council’s response.

Commissioner’s analysis and findings

18. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Gault and the Council. She is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

19. It is clear from the subject matter of Mr Gault’s request that any information falling within its scope would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns a relatively substantial residential development and alterations to waterways related to that development. The Commissioner is satisfied that the information would fall within either paragraph (a) of the definition of environmental information contained in regulation 2(1) of the EIRs (as information on the state of the elements of the environment, which include water, soil, land and landscape) or paragraph (c) of that definition (as information on measures affecting or likely to affect those elements).



Section 39(2) of FOISA – environmental information

20. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. The Council applied section 39(2) during the investigation. In this case, the Commissioner accepts that the Council was entitled to apply the exemption, given her conclusion that the information is properly classified as environmental information.
21. The exemption is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to the applicant, the Commissioner also accepts that, in this case, 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 6(1)(a) of the EIRs

22. In response to his requirement for review, the Council informed Mr Gault that further searches had uncovered planning application information and agreed that it should be provided to him by way of inspection at Council offices, "...thus safeguarding against copyright issues".
23. In his application to the Commissioner, Mr Gault expressed his dissatisfaction at being required to attend Council offices to inspect the information *in situ*. He provided reasons to explain why this was not suitable for him.
24. Regulation 6(1)(a) of the EIRs provides that where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless it is reasonable for it to make the information available in another form or format. It was only in his application to the Commissioner that Mr Gault expressed a specific preference that he be supplied with the information identified during the review, rather than viewing it *in situ*. However, the Commissioner considers it reasonable to interpret his request as a request to be supplied with all the information he was seeking.
25. As stated above, during the investigation the Council agreed to provide Mr Gault with the information contained on the CDs, in hard copy. However, the Commissioner takes this opportunity to comment on the Council's reference to copyright as a reason for claiming that the documents must be viewed *in situ*.



26. Section 50 of the Copyright, Designs and Patents Act 1988 states that if a particular "act" (e.g. the release of information in response to an FOI request) is required by an Act of Parliament, then the doing of that act does not infringe copyright. However, the usual copyright restrictions will apply to any subsequent use of the information by the requester. Specific provisions have already been put in place regarding the "act" of replying to information requests under FOISA - see article 3 of the Freedom of Information (Scotland) Act 2002 (Consequential Modifications) Order 2004. The Commissioner would expect the same principle to apply to requests made and responded to under the EIRs. In any event, regulation 5(3) of the EIRs provides that any enactment or rule of law which would prevent the making available of information in accordance with the EIRs shall not apply. Consequently, the Commissioner does not accept that copyright should be a concern to the public authority when providing information in response to a request – and therefore does not accept that copyright concerns alone made it reasonable for the Council to require inspection of the information it identified during the review.

“Missing” information

27. On receipt of the information supplied, Mr Gault remained dissatisfied that he had been provided with all of the information requested. Specifically, he stated that he had not been provided with information relating to the burn referred to in his request. There were documents referred to in the information supplied that had not been provided to him, pages of those supplied appeared to be missing and no information relating to current ongoing development works had been provided.
28. Mr Gault highlighted a number of specific examples of information he considered to be missing from the Council's response. The Council responded to each of these in turn. In some instances the Council stated that it was “unable to locate”, or did not hold, the information in question following searches. In some instances, the Council identified further information and provided it to Mr Gault during the investigation. The Council also offered further explanation in response to aspects of Mr Gault's concerns.
29. Mr Gault also stated that he was dissatisfied that he had not been provided with copies of completion certificates for the properties in question. In response to this point, the Council stated that these documents fell outwith the scope of Mr Gault's request, highlighting that his original request was for planning (and not building standards) documentation.
30. Having considered the terms of Mr Gault's request, while it may not have been quite as narrow as the Council suggests, the Commissioner is satisfied that it was reasonable to interpret it so as to exclude the completion certificates. She notes that the Council informed Mr Gault that, under Building Standards legislation, copies of completion certificates can only be provided to owners, prospective owners, occupiers or tenants, but that the Building Standards Register is available to view.



Searches conducted by the Council

31. The Council stated that the initial search involved obtaining the planning reference numbers by interrogating the Council's UNIFORM system. The Council explained that the UNIFORM system is a system which holds records on all planning applications from 1996/1997 onwards. Prior to this date, planning reference numbers were recorded on Ordnance Survey maps and a search for these was also undertaken. The Council stated that, as the information sought was contained in the UNIFORM system and OS maps, no search was undertaken of individual computers. Having obtained the relevant reference numbers, the Council stated that (due to their age) the files sought had been archived and were located on microfiche or on CD. The Council explained that the relevant CDs and microfiches were collected and copies taken of the documents contained within the relevant files.
32. The Council stated that no information had been destroyed in recent years, but (approximately 10 years ago) files relating to properties were "slimmed down" before being put on CD/microfiche.

Has all relevant information been identified, located and provided by the Council?

33. Regulation 5(1) of the EIRs requires authorities which hold environmental information to make it available to an applicant when requested to do so.
34. In this case, the Council identified further information during the Commissioner's investigation, and did not claim that any information was excepted from disclosure (or that the right of access was otherwise disappplied) under the EIRs at the time of the request or requirement for review (or subsequently).
35. The Commissioner has considered the Council's submissions and the information provided to Mr Gault during the investigation and has concluded that in dealing with his request, the Council did not identify, locate and provide all of the information it held and which fell within the scope of the request. Consequently, she must conclude that the Council failed to comply with regulation 5(1) of the EIRs in responding to Mr Gault's request.
36. The Commissioner has considered the Council's submissions with regard to the searches undertaken to identify all relevant information. On the basis of the limited details provided by the Council of the searches undertaken, and the fact that further information continued to be identified during her investigation, she is not satisfied that the Council carried out adequate searches to satisfy her that it held no further information. Specifically, the Commissioner notes that the Council's searches appear to have focussed entirely on planning information, but that information relating to works undertaken at the burn, for example, might be contained otherwise than in a specific planning application file.
37. She requires the Council to undertake further searches to satisfy itself – and her – that no further information is held. Should further information be identified by the Council during these searches, the Commissioner requires that the information be provided to Mr Gault or that an appropriate refusal notice be given under regulation 13 of the EIRs (see below).



38. The Commissioner would encourage the Council, in dealing with similar requests, to seek further particulars from the requester (under regulation 9(2) of the EIRs, where necessary – see below) to establish the exact scope of the request at the outset.

DECISION

The Commissioner finds that the Council failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Gault. The Council failed to comply with regulation 5(1) of the EIRs by not identifying, locating and making available information that fell within the scope of the request. The Commissioner is still not satisfied that the Council has conducted adequate searches to identify and locate all the information falling within the scope of this request, or to satisfy itself (and her) that no further information is held.

The Commissioner therefore requires the Council to conduct adequate searches for the information requested and, should further information be identified and located, make that information available to Mr Gault or give him an appropriate refusal notice under regulation 13 of the EIRs, by 7 October 2013.

Appeal

Should either Mr Gault or Scottish Borders 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
22 August 2013



Appendix 1

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.

(3) Any enactment or rule of law which would prevent the making available of information in accordance with these Regulations shall not apply.

...



6 Form and format of information

- (1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-
 - (a) it is reasonable for it to make the information available in another form or format;
or
 - ...

9 Duty to provide advice and assistance

...

- (2) Where a request has been formulated in too general a manner, the authority shall-
 - (a) ask the applicant as soon as possible, and in any event no later than 20 working days after the date of receipt of request, to provide more particulars in relation to the request; and
 - (b) assist the applicant in providing those particulars.

...

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;
- (d) if the exception in regulation 10(4)(d) is relied on, state the time by which the authority considers that the information will be finished or completed; and
- (e) inform the applicant of the review provisions under regulation 16 and of the enforcement and appeal provisions available in accordance with regulation 17.



Appendix 2

Copy of request

1. *I am officially requesting FOI details of Development Planning from the initial development request from the land owner (Mr Walker) up to the latest development of houses which is still to be completed as one plot is still up for sale and the road has not been completed. The latest development is not on Mr Walker's land. But run-off from his land could affect the houses.*
 - a. *So we are clear on what I am requesting I am looking to see the initial development request from the land owner and all documentation in between (minutes, letters, plans, geographical surveys, emails and telephone conversations) from the land owner and also from SBC. I am particularly interested in the telephone conversations) from the Land Owner and also from SBC. I am particularly interested in the telephone conversations within the last 10 years. I am aware that they will not be word for word but internal memos should exist referring to them.*
2. *As well as the above I am also interested in the documentation from land owners (please note the plural) that have resulted from the burn that flows down the hills and flows parallel with the old A701. This request has also to include any correspondence between SBC and land owners which may have resulted from the repairs to a culvert on the burn near the old A701 (that has taken place within the last month). These repairs are now complete. What I am trying to ascertain is if SBC had any involvement or knowledge of the works.*
 - a. *Again so that there is not ambiguity on what I am requesting I am looking to see the initial development request from the land owners or SBC and all documentation in between (minutes, letters, plans, geographical surveys, emails and telephone conversations) from the land owners and also from SBC.*
3. *And finally I am interested in the environmental reports regarding the layby within the second phase of the development at Halmyre Loan (i.e. houses 5 to 14). The layby in question lies between 5 Halmyre Loan and 9 Halmyre Loan, and adjacent to 8 Halmyre Loan.*
 - a. *With regards to this environmental report I am interested in the actions taken by SBC with regards to my wife's phone calls (26th and 28th July) and also mine (currently running near 40 calls since Monday 6th August, who was tasked with taking the action and when. Again all paper work, emails, internal memos etc.*
 - b. *This request is to include details of what actions were taken after receiving both my wife's and my telephone calls and emails. I.e. who was tasked with doing what and when.*