

Decision Notice



Decision 199/2013 Mr Ian W Baxter and Aberdeen City Council

Blue Badge Scheme

Reference No: 201301136

Decision Date: 12 September 2013

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Rosemary Agnew

Scottish Information Commissioner

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Summary

On 19 February 2013, Mr Baxter asked Aberdeen City Council (the Council) for a range of information on its Blue Badge Scheme. The Council responded by providing some information. Following an investigation, the Commissioner found that the Council had dealt with Mr Baxter's request for information in accordance with Part 1 of FOISA and the EIRs. She did not require the Council to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(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) (b) 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 the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 19 February 2013, Mr Baxter wrote to the Council requesting the following information:
 - Has a policy and process with respect to the detection and prosecution of fraud and abuse of the Blue Badge scheme been formulated, and if so, what is it? (request 1 – this referred to a related resolution of the Council's Enterprise, Planning and Infrastructure (E P & I) Committee)
 - Has a target figure been set for the number of detections of Blue Badge misuse, for the current year, of the type featured in Ms Trayner's recent reports to the E P & I Committee with the references EPI/12/151 and 224 and, if so, what is it? (request 2)
 - The total number of Blue Badges issued by the Council which existed during 2012 (request 3)



- The number of persons, during 2012, who were either warned or cautioned or advised or otherwise remonstrated with regarding presumed or actual improper or inappropriate use or misuse of a Blue Badge (request 4)
 - The total number of Blue Badge holders who, during 2012, had their badges withdrawn or cancelled or confiscated regarding presumed or actual improper or inappropriate use or misuse of their badges, either by badge holders or others (request 5).
2. The Council responded to request 2 on 12 March 2013, dealing with it under the EIRs. The Council confirmed that a target figure had been arrived at and provided a link to an agenda item containing a report, published on the Council website. The Council stated this information was already publicly available in terms of regulation 6(1)(b) of the EIRs, but provided a printed copy of the report.
 3. The Council sent a further response on 14 March 2013. Again, the Council dealt with the requests in terms of the EIRs, confirming that it was refusing the request in terms of section 39(2) of FOISA. It repeated its response of 12 March 2013, confirming this time that it related to request 1. For request 2, it stated that no targets had been set and provided an explanation. For request 3, the Council provided figures. It explained that no figures were held which would address request 4 fully, giving notice to this effect in terms of regulation 10(4)(a) of the EIRs: it did provide a figure for what appeared to be genuine misuse, where badge holders were warned. The Council answered request 5 and also explained the process involved in withdrawal, confiscation or surrender of blue badges.
 4. On 17 March 2013, Mr Baxter wrote to the Council requesting a review of its decision. He accepted that the Council's responses to requests 1 and 3 were satisfactory, but was dissatisfied with the responses to requests 2, 4 and 5. He believed the Council had provided two contradictory responses to request 2.
 5. The Council notified Mr Baxter of the outcome of its review on 17 April 2013. It acknowledged that its responses of 12 and 14 March 2013 were different. It apologised for this, confirming that the 14 March letter provided the correct response to request 2. Although it upheld the 14 March response, the Council noted that the points made by Mr Baxter in respect of requests 4 and 5 were "more a debate on policy" (which was not within the scope of the review).
 6. On 10 May 2013, Mr Baxter wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review (in respect of requests 2 and 4) 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.
 7. The application was validated by establishing that Mr Baxter made requests 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 those requests. The case was then allocated to an investigating officer.



Investigation

8. 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.

Commissioner's analysis and findings

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

FOISA or EIRs

10. "Environmental information" is defined in regulation 2(1) of the EIRs (paragraphs (a), (b) and (c) of the definition are reproduced in full in the Appendix to this decision). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various qualifications and exceptions contained in the EIRs.
11. The Council applied the exemption in section 39(2) of FOISA and dealt with the requests under the EIRs. Section 39(2) 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.
12. The Commissioner has considered the explanation provided by the Council for dealing with this information as environmental information. She is satisfied that the information falls within paragraph (c) of the definition in regulation 2(1), as information on measures affecting, or likely to affect, the elements of the environment. She therefore accepts that the information was exempt under section 39(2) of FOISA.
13. The exemption in section 39(2) 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 Mr Baxter in this case, the Commissioner has also concluded that the public interest in maintaining this exemption, and dealing with the request in line with the EIRs, outweighs the public interest in disclosure under FOISA.

Request 2

14. Mr Baxter's first ground of dissatisfaction was that he was given contradictory responses to request 2 in the responses of 12 and 14 March 2013. The Council, at review, apologised for this and confirmed that the response given on 14 March 2013 was correct.



15. Mr Baxter acknowledged that the Council dealt with the matter in its review, but expressed concern at its initial handling of this request. In the circumstances, the Commissioner is unable to make any formal finding on the Council's compliance with the EIRs, but would remind the Council of the importance of ensuring that it provides applicants with responses which address the relevant request accurately.

Request 4

16. Firstly, the Commissioner notes, as Mr Baxter has pointed out, that the Council's response to this aspect of Mr Baxter's requirement for review was confusing. While she accepts that it can be read as upholding the initial response to the request (as the Council appears to have intended), it also refers to the points made by Mr Baxter in this connection as "more a debate on policy" (and therefore not within the scope of the review). The Commissioner understands that the Council's Review Panel would not wish to get involved in any wider debate on what information the Council should have held, but would suggest that the point might have been made more clearly.
17. For request 4, Mr Baxter was dissatisfied as he had obtained similar figures in the past from the Council, and believed that during the period covered by his request (2012) – when surveys were being conducted and policies being developed – the Council would have continued to collect such statistics and use them to measure the success of any new Blue Badge regulation. He therefore believed that the Council held the information requested
18. Mr Baxter provided to the Commissioner copies of previous responses he had received from the Council. His previous requests were in similar terms to request 4.
19. The Council confirmed to the Commissioner that it wished to rely on regulation 10(4)(a) of the EIRs for Mr Baxter's requests, as it did not hold a total which would meet Mr Baxter's request (as opposed to the more restricted figure it provided).
20. The Council explained that, on receipt of Mr Baxter's request, the Council's central Access to Information Compliance Team identified that the most likely service to hold this information would be Enterprise, Planning and Infrastructure (EPI). It therefore passed the request to the Information Management Liaison Officer (IMLO) within EPI.
21. The IMLO within EPI had, the Council explained, sufficient knowledge within their service to identify which key officer(s) would be the most appropriate to answer Mr Baxter's request. In this case, that was the Team Leader (Traffic Management), who allocated the requests to an Engineer within the Traffic Management Team involved in administering Blue Badge policy.
22. The Council went on to explain that the Engineer investigated with the City Wardens (who are responsible for parking enforcement) if every instance of misuse had been recorded. They responded that it had not, and that City Wardens "had used a pragmatic and sensitive approach of educating Badge Holders" where it appeared there was a genuine error on their part. Where errors were extremely minor and a genuine error, these were not recorded.
23. The Council supplied copies of its internal emails showing who was asked and when.



24. The investigating officer put to the Council the reasons given by Mr Baxter why he (Mr Baxter) would expect the Council to hold the information requested. The Council was invited to address these, but it was made clear to the Council that the Commissioner was not asking the Council to justify its policy (rather that Mr Baxter's points were relevant to why a person might believe that the information they requested was actually held by the Council).
25. The Council responded that, as detailed in previous responses and in the relevant Committee report, a monitoring period was carried out in 2012 to establish the extent of Blue Badge misuse and to develop a formal policy for dealing with this. The Council was now following this policy.
26. The Council commented that the previous figures supplied to Mr Baxter were also the totals held, which were not necessarily the total number of people advised. As described above, it explained, minor instances of misuse were not recorded, and the Badge Holder was advised at the time as to the correct use of the Badge.
27. In deciding upon compliance with regulation 10(4)(a) of the EIRs, the standard of proof to apply in determining whether a public authority holds the requested information is the civil standard of the balance of probabilities. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the steps taken by the public authority to identify and locate the information in question. She will also consider, where appropriate, any other reason offered by the public authority to explain why the information is not held.
28. Having carefully considered all of the above, the Commissioner considers that the information requested in this instance should be readily identifiable by the Council, if held. The Council has explained the searches and enquiries it undertook to establish whether it held the information. The Commissioner accepts that the searches were reasonable and appropriate in the circumstances, and notes that the Council has identified such information as it holds and has provided a figure to Mr Baxter, albeit not the full figure requested.
29. The Commissioner is satisfied, on the balance of probabilities, that the Council does not hold the requested information. She acknowledges that Mr Baxter may believe more information *should* be held, but she can only consider whether it is (rather than whether it should be).

Public interest test

30. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs.
31. The Council stated that it was of the opinion that it had provided sufficient reasoning to explain that the requested information (the total number of persons, during 2012, who were either warned or cautioned or advised or otherwise remonstrated with regarding presumed or actual improper or inappropriate use or misuse of a Blue Badge) was not information it held when it received Mr Baxter's requests. On this basis, the Council was of the opinion that there was no public interest in requiring that the information be made available.



32. The Commissioner does not consider there to be any public interest in requiring the Council to make available any information covered by the request. She accepts that no such information is (or was) held. 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.

DECISION

The Commissioner finds that Aberdeen City Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Baxter.

Appeal

Should either Mr Baxter or Aberdeen City 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
12 September 2013



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.

...

- (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;
- (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;

...

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;
- ...