

Decision Notice



Decision 226/2013 Firrhill Community Council and the City of Edinburgh Council

Flooding in EH13 area

Reference No: 201301351

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www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

On 11 December 2012, Firrhill Community Council (FCC) asked the City of Edinburgh Council (the Council) for a wide range of information regarding flooding in the EH13 area of Edinburgh. The Council disclosed some information in response to part (e) of the request. Following a review, in which the Council informed FCC that parts (a) to (d) of its request were considered manifestly unreasonable and the information would not be provided, FCC remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council was entitled to withhold the information under regulation 10(4)(b) of the EIRs and had provided advice and assistance to FCC in line with regulation 9(1) of 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 (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) (definitions (a) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 9(1) (Duty to provide advice and assistance); 10(1), (2) and (4)(b) (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 11 December 2012, FCC emailed the Council requesting (amongst other things not the subject of this decision):
 - (a) The number of complaints received per year, by telephone/letter/e-mail, related to flooding in the EH13 area over the last 10 years, identifying cause or location.



- (b) A copy of all communications between local Councillors and Council departments/ sections, and between the departments/sections themselves in relation to flooding in the EH13 area since the completion of the flood defence work.
 - (c) A copy of all internal reports related to site visits in the EH13 area to view, discuss or assess flooding issues arising from complaints received, by any means, since completion of the flood defence work.
 - (d) A copy of all reports received from consultants in respect of flooding issues in the EH13 area arising from complaints received since the completion of the flood defence work.
 - (e) A detailed plan of the flood defence construction work carried out on that stretch of the burn from the raised bridge at Oxgangs Road North to the bridge at Firrhill Crescent – this to include details of the previously existing and new drainage systems covering either side of the burn at this location.
2. The Council responded on 24 December 2012. It provided copies of the plans covered by part (e) of FCC's request, and asked for clarification of the information sought in the remaining parts of the request.
 3. On 27 January 2013, FCC emailed the Council requesting a review of its decision on the grounds that the information requested had not been provided.
 4. FCC did not receive a response to its request for a review and, on 3 March 2013, emailed the Commissioner stating that it was dissatisfied with the Council's failure to respond and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
 5. Following this application, which led to *Decision 066/2013 Firrhill Community Council and City of Edinburgh Council*¹, the Council carried out a review and notified FCC of the outcome on 14 May 2013. The Council provided explanatory responses in relation to parts (a) to (d) of FCC's request, but stated that, due to the costs it would incur in providing the information, it considered these parts of the request to be "manifestly unreasonable". Under regulation 10(4)(b) of the EIRs, it was therefore not required to provide the information to FCC. The Council stated that it had provided the information requested in part (e) of FCC's request.
 6. On 6 June 2013, FCC emailed the Commissioner, stating that it 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.
 7. The application was validated by establishing that FCC 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 then allocated to an investigating officer.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2013/201300622.aspx>



Investigation

8. In correspondence with the investigating officer, FCC confirmed that it had been provided with the copies of the plans it requested in part (e) of its request. Therefore, this part of the request will be excluded from the Commissioner's consideration in this decision.
9. On 3 July 2013, the Council was notified in writing that an application had been received from FCC. The Council was invited to comment on the application (as required by section 49(3)(a) of FOISA) and asked to respond to specific questions. The Council was asked to justify its reliance on any provisions of the EIRs it considered applicable to the information requested.
10. Following receipt of FCC's application, the Council entered into dialogue with FCC as it considered that, in its application to the Commissioner, FCC had narrowed the scope of its request. The Council agreed to respond to this revised request. FCC, however, stated that this narrowed request was incorporated within its request of 11 December 2012, and still required the Commissioner to issue a decision on the Council's handling of that request.
11. The Council responded on 7 August 2013 to the investigating officer's letter, explaining why it considered the request to be burdensome and therefore manifestly unreasonable.

Commissioner's analysis and findings

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

FOISA or EIRs?

13. It is clear from the Council's correspondence with both FCC and the Commissioner that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The requested information relates to flooding in the EH13 area of Edinburgh, encompassing historical information, correspondence and site visits. The Commissioner is satisfied that it 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) or paragraph (c) of that definition (as information on measures affecting or likely to affect those elements).



Section 39(2) of FOISA – environmental information

14. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined in 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. In this case, the Commissioner accepts that the Council was entitled to apply the exemption to the withheld information, given her conclusion that it is properly classified as environmental information.
15. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that 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 10(4)(b) - manifestly unreasonable

16. The Council commented that, upon receiving a copy of FCC's application to the Commissioner, it had become clear to the Council that FCC was only interested in the Braid Burn Flood Prevention Scheme (BBFPS) and not the entire EH13 area. However, as noted above, FCC has asked the Commissioner to reach a decision on the way the Council dealt with the request submitted on 11 December 2012, which referred to the EH13 area rather than the BBFPS alone. The Commissioner must therefore consider whether the Council was correct in finding that parts (a) to (d) of this request were manifestly unreasonable.
17. Under regulation 10(4)(b) of the EIRs, a Scottish public authority may refuse to make environmental information available if the request is manifestly unreasonable. The Council considered the request to be manifestly unreasonable due to the significant burden (in relation to the cost and diversion of resources) that would be placed on the Council if it was to provide the information requested.
18. There is no definition of "manifestly unreasonable" in the EIRs, or in Directive 2003/4/EC from which they are derived. There is no single test for what sort of request may be manifestly unreasonable. Rather, it is to be judged on each individual request, bearing in mind all of the circumstances of the case. Generally, in applying this exception, the Commissioner is likely to take into account the same kinds of considerations as she would in reaching a decision as to whether a request is vexatious, in terms of section 14(1) of FOISA.
19. As with a "vexatious" request, there may be circumstances where the burden of responding alone justifies deeming a request to be "manifestly unreasonable". Unlike FOISA, there is no cost limit on complying with a request for environmental information, but there may be cases where the time and expense involved in complying with a request would be regarded as excessive by any reasonable person.



20. The cost limit prescribed by the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 may be a useful starting point in considering the application of regulation 10(4)(b). However, the fact that a similar request may be rejected under the provisions of section 12 of FOISA is just one factor to consider and does not, in itself, render a request made under the EIRs manifestly unreasonable. It should also be borne in mind that, in terms of regulation 8, an authority can charge a reasonable fee for making environmental information available.
21. There are other important factors which should be taken into consideration before concluding that environmental information can be withheld under regulation 10(4)(b). These include whether complying with the request would cause a disproportionate burden in terms of the workload involved, taking into consideration the size and resources of the public authority; the presumption in favour of disclosure in regulation 10(2)(b); the requirement to interpret exceptions restrictively (in regulation 10(2)(a)); and any other relevant circumstances particular to the case.

Council's submissions

22. In its submissions, the Council provided a list of the flood prevention work undertaken in the EH13 area of Edinburgh, which included:

- 1.6 km of floodwall
- 1.8 km of earth embankment
- 1.3 km of drainage
- 1 No replacement road bridge
- 1 No replacement footbridge
- 5 No replacement bridges in private gardens
- 1 No replacement culvert.
- Various public utilities were also diverted as part of the flood prevention scheme.
- Associated landscaping and accommodation works.

The Council explained that the works were covered by four separate contracts and were completed in June 2011.

23. The Council explained that the team responsible for the BBFPS project is comprised of three officers and a manager. A single officer is now responsible for dealing with any outstanding matters from the BBFPS following its completion. This officer's primary operational duties relate to two active flood defence projects, and meeting the requirements placed on the Council under relevant legislation, in addition to dealing with any questions about the BBFPS project.
24. The Council referred to its review response, in which it had provided cost calculations for each part of FCC's request. In its submissions, the Council provided a further detailed breakdown of the costs associated with each part of FCC's request, including an explanation of where / who held the information, the number of relevant boxes or files, and the staff who would be required (by virtue of their experience and technical knowledge) to undertake the work.



25. The Council explained that, after the review response was issued, it undertook further investigations which indicated that additional time would be required in order to provide the requested information. The Council stated that the key officer would potentially spend eight working weeks retrieving and collating the requested information, on a full time basis. This would have significant operational impacts on two active flood defence projects. The Council stated that it would also be necessary to seek assistance from other services, local Council offices and outside consultants to provide the information sought, and this would further increase the burden on the Council, resulting in a disproportionate expenditure of Council resources on this issue.
26. The Council commented that the scale of the time period and the geographic catchment area for which the records were requested demonstrated that it would be manifestly unreasonable to provide the information covered by the request, due to the burden this would impose on the Council. The staff time required to prepare the information for FCC would cause significant disruption to current Council projects and to the statutory responsibilities dealt with by the team charged with responding to FCC's request.
27. The Council estimated that it would take staff 293 hours to provide the requested information, including collating and if necessary redacting the information prior to issue. In total, the Council estimated that it would cost over £2,000 to provide the requested information covered by parts (a) to (d) of the request. The Council provided an overview of where the requested information was held, which included 35 box files, a further 42 box files held at an off-site location, and over 6,000 emails held by the Council on its systems.
28. The Council commented that it had sought to engage with FCC to help it refine the request and reduce the costs and burden in meeting the request. The Council noted that, in the FCC's review request, FCC had explained that it was unaware of the Council's filing systems and titles of reports and therefore needed to submit an "all encompassing" request. The Council concluded that if FCC was willing to engage with the Council in narrowing the scope of the request, then it might be possible for the Council to provide specific information.

FCC's submissions

29. In its application, FCC explained the reasons why it had made its request, which had been submitted following a meeting with the Council's Flood Prevention Maintenance / Project Team. FCC believed that Council officials must have known what information it was seeking, because of an ongoing dialogue with the Council's Transport Maintenance Team. FCC did not consider that the Council's "alleged inadequate filing system" should be an excuse to avoid releasing the information.



Commissioner's conclusions

30. The Commissioner acknowledges that, in common with all other Scottish public authorities, the Council has many demands on its time and resources, in addition to complying with requests for information under FOISA and the EIRs. Compliance with such requests should, however, be considered as an element of the authority's core business, being a statutory requirement. The Commissioner will not accept lightly arguments that compliance, in any given case, represents an unreasonable diversion from compliance with other core responsibilities.
31. The Commissioner notes that, although the Council's revised cost estimation was substantial, the key issue in this case is not how much it would cost to provide the information, but whether the Council was required to comply with the request, regardless of the fee it would be entitled to charge. The question for the Commissioner to decide is whether compliance would create such a burden for the Council that the request could be justifiably viewed as manifestly unreasonable, in terms of regulation 10(4)(b) of the EIRs.
32. The Commissioner accepts that the burden of providing the information would largely fall on one individual with the technical knowledge required to identify information covered by the request. The Commissioner is satisfied with the detailed explanation provided by the Council to justify the estimate of eight weeks' full-time work for that member of staff.
33. The Commissioner notes that FCC considers the request to be clear and precise and only seeking specific information. However, the Commissioner finds that the request was capable of covering a large amount of information held by the Council. The Commissioner understands that applicants may not know how an authority holds its information and so may decide to make a broadly-worded request, to be sure that it encompass the range of information sought. However, in deciding whether a request was manifestly unreasonable or not, the Commissioner must consider the public authority's response to the request as it was actually worded, even where she understands that this may go beyond what the request was intended to achieve.
34. FCC considers that the Council should have interpreted its request more narrowly in view of its previous dialogue with Council officials, but the Commissioner considers that, due to the way FCC's request was worded, this was not feasible. The request specified information from the whole EH13 area, and not just the narrower area in which the FCC may have been known to be most interested. The Commissioner notes that the Council provided guidance to FCC as to how the request could be narrowed and the types of information it held, but FCC did not follow this up with the Council.
35. Given the volume of information potentially covered by FCC's request, and the range of resources which would have to be searched to retrieve it all, the Commissioner accepts that dealing with the request would require a significant amount of staff time, particularly from one key officer with the necessary knowledge and experience. She accepts that providing the information could only be done by diverting a disproportionate quantity of the Council's resources away from other essential core operations, with a significant negative impact on the Council's ability to carry out its functions. Consequently, the Commissioner is satisfied that FCC's request fell within the terms of regulation 10(4)(b) of the EIRs.



36. The Commissioner must now go on to consider the public interest test in relation to this exception.

Consideration of the public interest test

37. In common with all the other exceptions in the EIRs, regulation 10(4)(b) is subject to the public interest test set out in regulation 10(1)(b). Consequently, information can be withheld under the exception only where, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
38. In its application, FCC explained that the requested information is required because people living in close proximity to the flood wall complained to FCC that they are finding the ground around and under their homes to be constantly saturated with water, and they consider that the flood defence works have prevented the natural drainage of rain water from the land into the burn. In addition, people whose gardens were used during the construction of the flood wall are concerned about hazardous contaminants left in the soil and the risk to their children and grandchildren.
39. The Commissioner accepts that there is a strong public interest in disclosure of information where this would add to residents' understanding of the effect that the flood defence works have or have not had on their properties, particularly where there are concerns about health hazards.
40. In its submissions, the Council accepted that there is a clear public interest in demonstrating that it has carried out the necessary assessments and actions to ensure the flood defence works are fulfilling their functions, and are not creating new flooding problems and inflicting harm to the residents within the FCC catchment area. The Council also considered that releasing the information FCC is seeking would be in the public interest as it would provide transparency and accountability, which should be encouraged at all times in Government.
41. In this instance, however, the Council considered that disclosure would be against the public interest because of the burden that would be incurred in providing the information. It stated that "the totality of the request is an unreasonable diversion of staff effort from its normal duties and would not be a good use of publicly funded effort". This diversion of staff time would result in public resources that are required to be utilised for the benefit of all citizens in Edinburgh being diverted disproportionately to respond to the specific concerns of a single neighbourhood.
42. In the Commissioner's view, there is an inherent public interest in disclosure of information that would ensure that an authority is transparent about the nature and extent of the information that it holds, and which would permit adequate public scrutiny of its actions. In this case, there is a clear public interest in the disclosure of information which would permit scrutiny of the flood defence work undertaken by the Council in the area in question, particularly in view of the concerns raised by FCC on behalf of local residents.



43. On the other hand, there is also a strong public interest in a Scottish public authority being able to carry out its core functions without unreasonable disruption. In this case, the Commissioner is satisfied that, if the Council was required to respond to this request, it would place a significant burden on the Council in terms of time and expense. Even taking into consideration the size of the Council as an organisation, and the resources available within it, the Commissioner accepts that providing the extensive volume of information requested by FCC would, to a disproportionate extent, divert resources required to fulfil its other statutory functions, including flood risk management.
44. The Commissioner considers there is a public interest in protecting the integrity of the EIRs and ensuring that they are used responsibly. While public authorities are encouraged towards acting in a transparent and accountable nature which benefits the public as a whole, it is not the intention of the legislation to require public authorities to devote excessive amounts of time to one particular request. The Council has a responsibility to respond to other requests it receives, as well as carrying out its other statutory functions, and there is a public interest in ensuring resources are not diverted away from this.
45. On balance, therefore, while there are certainly strong public interest arguments in favour of disclosure of the information covered by FCC's request, the Commissioner accepts that, in the circumstances of this case, these are outweighed by the public interest in preventing the disproportionate levels of disruption to the Council's core functions that would result if resources were diverted to provide all the information requested by FCC. In reaching this conclusion, the Commissioner has had to consider the effects of providing all information potentially covered by the wide-ranging request submitted by FCC, and does not rule out the possibility that a different decision would be reached in relation to a narrower, more focused request. In the circumstances of the current case, the Commissioner concludes that the Council was entitled to withhold the requested information under the exception in regulation 10(4)(b) of the EIRs.

Regulation 9(1) – Duty to provide advice and assistance

46. Regulation 9 provides that a Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect it to do so, to applicants and prospective applicants.
47. As detailed above, FCC considered that the Council should have interpreted its request more narrowly in view of its previous dialogue with Council officials. The Commissioner can understand how FCC could have come to this view given its contact with the Council. However, the Council is required, as is the Commissioner, to proceed on the basis of the actual request and any further, clear, amendments made to it by the requester. There were no clear amendments requested of the Council apparent in this case.



48. The Commissioner notes that, in its review response, the Council provided explanatory responses to FCC describing how the request could be narrowed and asked FCC to refine and resubmit its request in line with the guidance provided. The Council also entered into dialogue with FCC during the investigation, with the aim of focussing on the key information that FCC wanted and eliminating the requirement for the Commissioner to issue a decision. However, as noted above, FCC requested that the Commissioner continue with the investigation and issue a decision on the basis of its request dated 11 December 2012.
49. The Commissioner is aware that requesters often face difficulties in wording their requests effectively when they have no detailed knowledge of the information held by the public authority, and has developed some "Tips for Requesters"², which include guidance on wording a request so that the information sought can be easily identified by the authority.
50. Having considered the entirety of the Council's submissions, the Commissioner is satisfied that the Council provided appropriate advice and assistance to FCC in both its review response and in other correspondence with FCC during the investigation, and in doing so, complied with regulation 9(1) of the EIRs.

DECISION

The Commissioner finds that the City of Edinburgh Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Firrhill Community Council.

Appeal

Should either Firrhill Community Council or the City of Edinburgh 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.

Rosemary Agnew
Scottish Information Commissioner
10 October 2013

² <http://www.itspublicknowledge.info/YourRights/Tipsforrequesters.aspx>



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;

...

(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.

...

9 Duty to provide advice and assistance

(1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...



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

...

- (b) the request for information is manifestly unreasonable;

...