



Scottish Information
Commissioner
www.itspublicknowledge.info

Decision Notice 086/2022

Cost of planning process for Assembly Rooms, Dunbar

Applicant: Applicant

Authority: East Lothian Council

Case Ref: 202200336

Summary

The Applicant asked the Authority for a breakdown of the total cost of dealing with the denial of planning permission for the Assembly Rooms, Dunbar as well as grants and other monies. The Authority informed the Applicant that it did not hold any information which would fulfil his request. The Commissioner investigated and found that the Authority was entitled to notify the Applicant that it did not hold the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 47(1) and (2) (Application for decision by Commissioner); 49(3)(a) (Commissioner's decision)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of "the Act", "the applicant" and "the Commissioner" and definitions (a) to (c) of environmental information) (Interpretation); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1) and (4)(a) (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

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

Background

1. On 4 February 2022, the Applicant made a request for information to the Authority. He asked for “a full breakdown of the total cost to the public purse for all the dealing with the Assembly Rooms, Church Street, Dunbar for the denial of planning just what is the total cost to the public purse over the last 40 years or more that this has been going on, including the grants and other monies that are included over the various expenses fees and costs incurred.”
2. The Authority responded on 2 March 2022. The Authority processed and responded to the request under the EIRs. The Authority relied on the exception in regulation 10(4)(a) of the EIRs, and explained that it was unable to comply with the Applicant’s request because the requested information was not held or recorded.
3. The Authority stated that its planning service does not record how long is spent dealing with planning applications. It also commented that it has no record of any expenditure associated with the Dunbar Assembly Rooms in terms of grants and payments that have been sent out.
4. On 4 March 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because, as the Authority is responsible and required to keep detailed accounts of any expenditure to do with the public purse, he considered there should be no way the Council cannot have very detailed accounts of the cost incurred by it. The Applicant asked again for the requested information.
5. The Authority notified the Applicant of the outcome of its review on 16 March 2022. In doing so, it set out a number of factors it had considered when carrying out the review. These included:
 - (i) Planning had confirmed that they do not record how long is spent dealing with planning applications. Without this information it is impossible to calculate a cost.
 - (ii) The Finance Team checked the list of grants to identify any that were made to the Assembly Rooms on Church Street, Dunbar using a number of variations of the name, and no payments were found.
 - (iii) It acknowledged that the Applicant was correct to say that the Authority is required to keep proper accounts. The Authority stated that these are completed each year in line with statutory requirements, and subject to external review from Audit Scotland, before being scrutinised by the Authority’s own Audit and Governance Committee.
6. The Authority explained that, having reviewed the request, it was upholding its decision.
7. On 18 March 2022, the Applicant wrote to the Commissioner, applying 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 specified modifications. The Applicant stated he was dissatisfied with the outcome of the Authority’s review because he considered it very strange that the Authority would hold no information as to the financial costs incurred by it when dealing with the plans for the renovation work to the building, when it had been involved in the matter for over 30 years. The Applicant also considered it a very strange way for the Council to conduct business in failing to keep records of materials, time and planning and site visits.

Investigation

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
9. On 6 April 2022, the Authority was notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to details of the searches carried out by the Authority to establish that it held no recorded information which would fulfil the Applicant's request.

Commissioner's analysis and findings

11. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Handling in terms of the EIRs

12. The Authority processed and responded to the Applicant's request and requirement for review in accordance with the EIRs.
13. Where information falls within the scope of the definition of "environmental information" in regulation 2(1) of the EIRs, a person has a right to access it (and the public authority a corresponding obligation to respond) under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
14. The Applicant has not challenged the Authority's decision to deal with the information as environmental information. The Commissioner is satisfied that the information does comprise environmental information (see in particular paragraphs (a), (b) and (c) of the definition in regulation 2(1) of the EIRs) and will consider the handling of the request in what follows solely in terms of the EIRs.

Regulation 5(1) – Information falling within scope of the request

15. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by an applicant. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the Authority should hold.
16. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available. If no such information is held by the authority, the exception in 10(4)(a) of the EIRs permits the authority to give the applicant notice to that effect.

Regulation 10(4)(a) – Information not held

17. The Authority is relying on the exception in regulation 10(4)(a) of the EIRs for information which would fulfil the Applicant's request.

18. The Commissioner has taken account of the submissions provided by the Applicant in which he has indicated that he believes that the Authority should hold information which would fulfil his request. While the Applicant clearly has genuine reasons for believing the Authority should hold information of the nature covered by his request, the Commissioner can only consider whether or not the Authority identified and located the information it actually held.

Test to be applied in the use of the exception

19. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations as to what information the Authority should hold, ultimately the Commissioner's role (as indicated above) is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).

The Authority's submissions about the exception

20. Within its submissions, the Authority provided background information which explains that various planning applications have been submitted to it since 1994 for the development of the Assembly Rooms in Dunbar.
21. The Authority submitted that details of the Applicant's request were shared with its Planning, Finance, Public Health/Environmental Protection, and Estates Services. It was staff within those service areas who carried out searches for information, or used the knowledge they had of what recorded information was held to explain that no relevant information was held by the Authority.
22. The Authority informed the Commissioner of the systems searched and the key words and search parameters used. It also informed the Commissioner that no information was identified regarding the length of time spent on processing (and in particular "denying") planning applications.
23. Whilst the Authority acknowledged that it maintains, and is expected to maintain, a financial ledger, recording income and expenditure, this does not constitute a "costing system" which would record the net costs of a particular process. Instead, any costs would have to be calculated and inferred from the ledger. The Authority stated that its annual accounts are scrutinised externally by Audit Scotland, and further scrutinised by its Audit Committee. Information is also provided to the Scottish Government.
24. With regard to the Planning function, the Authority explained that all income incurred by the Planning Team is recorded on the ledger, but not on an individual case basis. The Authority stated that all planning applications are subject to a fee, set by statute, and any changes are recorded in the ledger's overall incomings. However, these statutory fees only offset a portion of the Authority's costs in real terms relating to the processing of planning applications. As such, these figures do not provide a readily available account of overall costs.
25. The Authority explained that it is not required to record working time spent on any aspect of processing or responding to planning applications. Therefore, this information is not held for the Assembly Rooms.

26. In terms of grants/monies paid, the Authority commented that it does record information relating to individual transactions, including details of who has been paid as well as transaction descriptions. It submitted that, if information which would fulfil this portion of the Applicant's request was held, it would have been relatively straightforward to identify it. The Authority informed the Commissioner of the nature of the searches carried out and the systems interrogated. All of these searches led the Authority to conclude that no information is (or was) held by it regarding any grants or monies paid out in relation to the Assembly Rooms.
27. The Authority also submitted that there is no legal duty to record time spent by its Officers regarding Planning Applications, and this information does not require to be accounted back to any party. With regards to grants/monies paid, the Authority stated that, if information were held in this regard, it would have a clear audit trail to demonstrate the payment. The Authority submitted that it does not have a legal duty to hold information specifically covered by the Applicant's request (i.e. "cost to the public purse") in a form which would constitute readily accessible recorded information.

The Applicant's submissions about the exception

28. In his submissions, the Applicant explained that he considered it very strange that there are no financial costs recording the Council's dealing with the plans for the renovation work to the building, when it had been involved in this matter for over 30 years.
29. The Applicant also considered it a very strange way for the Council to conduct business by failing to keep records of materials, time and planning and site visits.

The Commissioner's view about the exception

30. From reading the contextual information provided by the Authority in its submissions, it is clear that a number of applications for Planning Permission have been submitted for work on part of the Assembly Rooms over the time period 1994 until 2022. This would suggest that the Authority has been involved in carrying out work in relation to the consideration and processing of these planning applications.
31. As noted above, while it is clear that the Applicant has genuine reasons for believing that the Authority should hold recorded information covered by his request, the Commissioner can only focus on what recorded information is actually held by the Authority.
32. Having considered all of the submissions from the Authority, the Commissioner is satisfied, based on these submissions, that adequate searches were carried out of relevant electronic systems, which would have been most likely to hold recorded information which would fulfil all of the Applicant's request.
33. The Commissioner is also satisfied that the personnel involved in carrying out the searches were the most appropriate to do so, based on their job role and experience. He also accepts that those staff members would have been most likely to know what information is held, and where.
34. The Commissioner also recognises that there appears to be no legal requirement or internal or external guidance which requires the Authority to record the time spent by individual officers on work carried out in respect of dealing with the denial of planning for the Assembly Rooms.
35. In all the circumstances, therefore, the Commissioner is satisfied, on the balance of probabilities, that the Authority does not (and did not, at the time the request was received

from the Applicant) hold recorded information which would fulfil the Applicant's request. The Authority was therefore entitled to rely on the exception in regulation 10(4)(a) of the EIRs, on the basis that it did not hold the information requested.

36. This exception is subject to the public interest test in regulation 10(1)(b) of the EIRs, but the Commissioner can identify no conceivable public interest in requiring disclosure of information which the Authority does not hold: on balance, therefore, the Commissioner is satisfied that the public interest in maintaining the exception should prevail.

Decision

The Commissioner finds that the Authority complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or the Authority 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.

Daren Fitzhenry
Scottish Information Commissioner

28 July 2022

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
- (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) 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;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

...

49 Commissioner's decision

...

- (3) In any other case the Commissioner must –
- (a) give that authority notice in writing of the application and invite its comments;

...

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

- (1) In these Regulations –
- “the Act” means the Freedom of Information (Scotland) Act 2002;

“applicant” means any person who requests that environmental information be made available;

“the Commissioner” means the Scottish Information Commissioner constituted by section 42 of the Act;

...

"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.

...

- (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;

...

17 Enforcement and appeal provisions

- (1) The provisions of Part 4 of the Act (Enforcement) including schedule 3 (powers of entry and inspection), shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in paragraph (2).
 - (2) In the application of any provision of the Act by paragraph (1) any reference to -
 - (a) the Act is deemed to be a reference to these Regulations;
 - (b) the requirements of Part 1 of the Act is deemed to be a reference to the requirements of these Regulations;
- ...
- (f) a notice under section 21(5) or (9) (review by a Scottish public authority) of the Act is deemed to be a reference to a notice under regulation 16(4); and

...