



Scottish Information
Commissioner
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Decision Notice 008/2024

Noise monitor recording

Applicant: The Applicant

Authority: Fife Council

Case Ref: 202200212

Summary

The Applicant asked the Authority for noise data information gathered from noise monitoring equipment for two dates. The Authority informed the Applicant that it did not hold any information falling within the scope of the request. The Commissioner investigated and found that the Authority had been entitled to inform the Applicant that no relevant information was held.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “applicant” and “the Commissioner”) (paragraphs (b) and (c) definition 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) and (b) (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 26 November 2021, the Applicant made a request for information to the Authority. He asked for information from specified noise recording equipment (of the Authority) for a particular time period on two specified dates.
2. The Authority sought clarification of the request from the Applicant, on 2 December 2021. The Applicant responded on the same day, referring the Authority's FOI staff (who had sought the clarification) to another Authority staff member whom the Applicant had initially emailed with the requested dates and times.
3. On 3 December 2021, this staff member of the Authority confirmed to the Authority's FOI staff that the Applicant had requested information for 21 October 2021 between 4am and 5am and for 26 October 2021 between 1am and 2am.
4. The Authority then responded on 6 January 2022. It informed the Applicant that it held no information falling within the scope of his request.
5. Having received that response, on 6 January 2022 the Applicant wrote to the Authority, requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he considered that the information he had requested must be held by the Authority, given that its noise monitoring equipment had been in his home and he had been present when the memory cards were retrieved by the Authority's staff from the machine.
6. The Authority notified the Applicant of the outcome of its review on 26 January 2022. It informed the Applicant that the information requested fell under the definition of "environmental information" in terms of the EIRs, and that the Authority was therefore responding to the Applicant's request in terms of the EIRs. The Authority upheld its original response and stated that, in terms of regulation 10(4)(a) of the EIRs, no information was held. It provided the Applicant with advice and assistance in terms of regulation 9 of the EIRs by explaining that the information for 21 October 2021 was not recorded on the card, the reason for this being unclear, and that the data from 26 October 2021, although successfully recorded and downloaded, had not been retained.
7. On 17 February 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 that he was dissatisfied with the outcome of the Authority's review because he could not understand how the Authority could not hold the information. .

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 26 July 2022, the Authority was notified in writing that the Applicant had made a valid application.
10. On 18 July 2023, in line with section 49(3)(a) of FOISA, the Commissioner invited the Authority to provide its comments.
11. The case was subsequently allocated to an investigating officer.

12. The Applicant did not provide any comments in addition to those in his application.

Commissioner's analysis and findings

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

EIRs or FOISA?

14. As noted above (at paragraph 6), when the Authority provided its review outcome it determined that the request was for environmental information, as defined by regulation 2(1) of the EIRs. It sought to apply section 39(2) of FOISA, and proceeded to deal with the request solely under the EIRs.
15. The information requested concerns noise data collected by the Authority to investigate noise complaints from members of the public. The Commissioner is satisfied that this information would fall within paragraphs (b) and (c) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in Appendix 1 to this decision).
16. In this case, therefore, the Commissioner accepts that the Authority was entitled to apply the exemption in section 39(2) of FOISA, given his conclusion that it is properly considered to be environmental information. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
17. As there is a separate statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. In the circumstances, he will consider this case, in what follows, solely in terms of the EIRs.

Regulation 5(1) – Duty to make environmental information available

18. Regulation 5(1) of the EIRs requires a Scottish public authority which holds the information to make it available when requested to do so by any applicant. This obligation relates to information that is held by the authority when it receives a request.
19. On receipt of a request for environmental information, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to make the information available, unless a qualification in regulation 6 to 12 applies (regulation 5(2)(b)).
20. Under the EIRs, a Scottish public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.

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

21. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make information available to the extent that it does not hold the information when it received the request.
22. The standard of proof to determine whether a Scottish public authority holds the information is the civil standard of the balance of probabilities. In determining where the balance of probabilities 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 reasons 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 about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant information is (or was, at the time the request was received) held by the public authority.

The Applicant's submissions on the exception

23. The Applicant expressed his lack of understanding as to how the Authority could not hold the information he had requested, given that he had seen the memory card being removed from the machine in his house by the Authority's staff. He highlighted that he had asked for information about recordings to be fed back to a public meeting that was held, and had repeated this request on the telephone. The Applicant stated that he understood that the reason the information could not be brought to the meeting was that the data had not yet been analysed.
24. The Applicant questioned how something could have happened to the data he had requested, for not one but two separate dates, and he did wonder if there was a deliberate attempt to keep the data from him.

The Authority's submissions on the exception

25. The Authority explained how the data is collected from noise monitoring equipment, such as the equipment that was situated in the Applicant's home. It explained that the memory card is collected from the machine, and a member of the Authority's staff then listens to what has been recorded, making a record of what is heard and when on a spreadsheet. The data from the memory card is then downloaded onto a computer, so that it can be analysed using the specialist software related to the noise equipment, after which the memory cards "are wiped" i.e. the recorded information is deleted from the memory card.
26. The Authority, in its submissions to the Commissioner, explained that in this instance the purpose of the noise monitoring was in response to a complaint, and that the equipment was installed so that the Applicant could make a recording when the noise was affecting him.
27. The Authority described the searches it had carried out for the information, including searches on the sound card and the database that sound information is stored on, but no information was found for the requested dates. It confirmed that no information was identified in diaries and correspondence from the dates the card was retrieved from the Applicant's address.
28. The Authority stated that, with regard to the information for 21 October 2021, there was no data on the memory card available to download. It confirmed that this did not just affect the time period requested by the Applicant, but that there was no data at all on the card for 21 October 2021. The Authority considered that this was possibly due to a loss of power to the machine, but it could not be sure. The Authority explained that this type of failure is rare, but that it had happened before, and the frequency is around once or twice per year, usually because of a power cut, or because the power to the machine is accidentally turned off.
29. In respect of the information relating to 26 October 2021, the Authority submitted that the spreadsheet relating to this memory card noted that on 14 – 19 October 2021 it sounded as if the microphone had been placed outside the window, and that this observation was also noted for 26 October 2021, and that as such all the information on the sound card was deleted "to avoid clutter".

30. The Authority commented that the officer who deleted the information was not aware of the Applicant's request at the time he deleted the information.
31. The Authority further explained that when the request was received, it was not possible to identify the computer that had been used to download the original file and the Authority was therefore unable to identify if the data could be restored. The Authority also described an issue identified with saving sound data to a new file management system it was switching to. Although the Authority's IT department was working on a resolution to this, it meant that files were stored on individual computers rather than backed up on the shared drive. In conjunction, office reconfiguration that had taken place around this time involved reconfiguration and updating of desktop computers, which included the wiping of all information held on the hard drives - including downloads and trash.

The Commissioner's view on the exception

32. The Commissioner has considered the searches carried out and the explanations provided by the Authority as to why the information falling within the scope of the Applicant's request is not held. He is satisfied that the searches have been thorough and would have found the information, if it were held by the Authority.
33. Although it is clear the Applicant had a genuine reason for believing the Authority should hold recorded information covered by his request, and the Commissioner can appreciate why the Applicant should have such a view, the Commissioner can only focus on what recorded information is actually held by the Authority (or was at the time of the request).
34. It would seem to the Commissioner that an unfortunate series of events may have led to the circumstances where the information the Applicant reasonably expected the Authority held was not in fact held. The Authority has explained what was involved in the process of collecting and storing the recording data and has made suggestions and explanations, which the Commissioner accepts are plausible, as to why the particular information that was requested by the Applicant was not held.
35. In all of the circumstances, therefore, the Commissioner is satisfied, on the balance of probabilities, that the Authority does not 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.

The public interest

36. The exception in regulation 10(4)(a) of the EIRs is subject to the public interest test in regulation 10(1)(b) and so can only apply if, in all the circumstances of the case, the public interest in maintaining the exception outweighs that in making the information available. The question of whether or not a public authority holds information is a factual one, determined on the balance of probabilities. If a public authority does not hold the information, then there is no meaningful public interest test that can be undertaken.
37. In this case, for the reasons set out above, the Commissioner is satisfied that the Authority does not hold any information covered by the request, and did not do so, on receipt of the request. Consequently, he accepts that there is no conceivable public interest in requiring the disclosure of such information and finds that the public interest in making information available is outweighed by that in maintaining the exception.

Handling of the request

38. From the information in the Authority's and the Applicant's submissions to the Commissioner, it is clear that the Applicant indicated his interest in the noise information from the sound card to the Authority, even before the card was collected from his house.
39. The Authority, in its submissions to the Commissioner, recognised that it had failed to identify the Applicant's requests for the information from the sound card in earlier emails, and so these requests were not passed to its FOI team, or to the officers responsible for compiling data from the sound cards. The Commissioner acknowledges that it is a possibility that at the time the Applicant first raised his interest in the sound data, the information for the time period on 26 October 2021 might still have been held by the Authority: he also acknowledges, however, that it is not possible to establish this with any greater certainty now.
40. The Authority explained some of the pressures that its Environmental Health Department was facing during this time period, and that this Department played an integral role in the pandemic recovery and the safety and well-being of the residents of Fife, as well as its usual business as usual workload/complaints.
41. The Commissioner recognises the challenges faced by the Authority in managing communication to a normal standard at that challenging time, but it remains that, unfortunately, the Applicant's request was not identified to the officer handling the data, before the data was possibly deleted. The Commissioner trusts that the Authority has recognised, through this application, the need to ensure that requests are recognised when made, allowing appropriate measures to be put in place to retain any relevant recorded (environmental) information that it holds.

Decision

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

The Commissioner finds that by informing the Applicant that the information falling within the scope of his request was not held, the Authority complied with the EIRs.

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.

Euan McCulloch
Head of Enforcement

10 January 2024

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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

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.
- ...

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).

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

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...

- (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

...