



Scottish Information
Commissioner
www.itspublicknowledge.info

Decision Notice 085/2024

Council's handling of a complaint about a planning issue

Authority: Clackmannanshire Council
Case Ref: 202200424

Summary

The Applicant asked the Authority for information regarding its refusal to take enforcement action in relation to a neighbour's garden fence. The Authority provided the Applicant with information but the Applicant was not satisfied that all of the information had been identified. The Commissioner investigated and found that the Authority had failed to identify and disclose twelve documents that fell within the scope of the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information") (Interpretation); 5(1) (Duty to make environmental information available on request); 13 (Refusal to make information available); 16(4) (Review by Scottish public authority); and 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 12 February 2022, the Applicant made a request for information to the Authority. She referred to a planning decision made by the Authority, and submitted a Subject Access Request (SAR) under the UK General Data Protection Regulations (UK GDPR) and also asked for information under the EIRs in the following terms:

I am also making a request under the Environmental Information Regulations (Scotland) 2004 in respect of all other information in relation to this matter. This includes any information related to the decision-making process, investigations and conclusions reached and in particular in relation to why the council did not think it had to follow prescribed legislation.

2. The Authority responded on 25 February 2022. It explained why it was upholding the original planning decision but it did not respond to the information request, instead it told the Applicant that she should submit her information request via a specific online form, and it provided a link to this form.
3. On 27 February 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that she was dissatisfied with its response because she did not accept that she had to fill out a specific form in order to make an information request under the EIRs, and she wanted the Authority to provide her with the information she had already asked for on 12 February 2022.
4. On 10 March 2022, the Authority wrote to the Applicant and provided her with information falling within the scope of her SAR and information request. It claimed this email was a response to the Applicant's request for information.
5. The Authority notified the Applicant of the outcome of its review on 1 April 2022. It explained that it had dealt with her information request as a SAR under the UK GDPR, as the only information it held was her own personal data. The Authority noted that the response to her EIRs' information request was processed as part of its response to her SAR on 10 March 2022. It apologised for not making this clearer.
6. On 10 April 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 she was dissatisfied with the outcome of the Authority's review because it claimed that all of the information that fell within the scope of her information request was her own personal data, and she did not accept that this was the case. The Applicant also expressed dissatisfaction with the Authority's handling of her information request.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 19 May 2022, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant and the case was allocated to an investigating officer.

9. 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 its reasons for claiming that all of the information that fell within the scope of her request was the Applicant's own personal data.

Commissioner's analysis and findings

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

Handling in terms of the EIRs

11. The Authority considered the Applicant's request under the EIRs, having concluded that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
12. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
13. The Applicant requested information related to the Authority's decision to refuse to take enforcement action for a newly erected garden fence.
14. The Commissioner has considered the terms of the request and the information captured by the request and he is satisfied that the information falls within the definition of environmental information set out in regulation 2(1), in particular, paragraphs (a) and (c) of that definition.

Regulation 5(1) of the EIRs

15. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
16. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
17. In its review outcome of 1 April 2022, the Authority notified the Applicant that, in its view, the only information that fell within the scope of her information request was her own personal data, which it had disclosed, as part of its response to her SAR on 10 March 2022.
18. The Applicant disputed the Authority's position that the only information it had disclosed on 10 March 2022, was her own personal data. The Applicant noted that the information she had received included details on policies as well as a letter to a neighbour not following planning legislation. The Applicant argued that none of this information was her personal data, and she expressed concerns that the Authority did not understand what personal data was.
19. The Commissioner has reviewed the information disclosed to the Applicant on 10 March 2022, and he agrees that it is not solely the personal data of the Applicant. It appears to include information falling within scope of both her SAR and information request. The Commissioner notes that the Authority did indicate, in its covering email of 10 March 2022,

that the information it disclosed was a joint response to both the SAR and EIRs request, but it appears to have changed position in the review outcome, claiming that all of the information it had previously disclosed was the Applicant's own personal data.

20. The Commissioner is not satisfied that all of the information disclosed in response to the Applicant's request was her own personal data, and he therefore finds that the Authority should have processed and responded to the Applicant's information request in line with the EIRs, and not, as it said it did at review stage, as a response to a SAR. In failing to provide the Applicant with a response under the EIRs, the Commissioner finds that the Authority breached regulation 5(1) of the EIRs.
21. The Authority was questioned about its interpretation of the Applicant's information request, and the searches it had conducted to identify relevant information. In response to these questions, the Authority noted that it had carried out further searches and had identified four additional documents that fell within the scope of the Applicant's information request. During the investigation, the Authority disclosed these four documents to the Applicant in unredacted form.
22. The Applicant reviewed the contents of these four documents but she was not satisfied that the Authority had identified all of the information falling within the scope of her information request. She noted that there was a big gap between the correspondence of 6 October 2021 and 9 February 2022. The Applicant also referred to the content of the four disclosed documents, noting that document 1 referred to the cost of making a planning application to the Authority, and she queried why the Authority would write off this cost (by failing to take enforcement action) without any documented decision making.
23. The Applicant noted that document 2 appeared to be a response to another email as it had "Re." in the subject heading, and in the body of the text the author of the document stated "I agree". The Applicant argued that there must be an email that preceded document 2, and the Authority should provide this to her.
24. The Authority was asked to carry out additional searches for information falling within the scope of the Applicant's information request between 6 October 2021 and 9 February 2022. The Authority was questioned about documentation that appeared to precede document 2, as well as other inferences in the documents that suggested that there had been contact from the householder who erected the garden fence.
25. The Authority initially argued that it had identified no additional information as a result of its searches. It noted that there was no written or recorded communication (an email, letter, notes from a telephone conversation, etc.) from the householder in relation to the Council's letter of 6 October 2021, and the subject matter contained therein. It explained that communication between the householder and an official in its Planning Department was by telephone and no notes were taken during or after the conversation.
26. The Authority also argued that it held no further recorded information between 6 October 2021 and 9 February 2022. It explained that an internal discussion took place between members of its Planning Department prior to the update email of 9 February 2022 (Document 2). The Authority commented that no written notes were taken at or following this internal discussion. The Authority also noted that the relevant Team Leader no longer worked for the Authority and so it was unable to make any further enquiries of him. It acknowledged that the four documents it had identified during the investigation should have been identified and disclosed to the Applicant earlier, and it apologised for this omission.

27. The Commissioner remained dissatisfied with the outcome of the latest searches conducted by the Authority. He rejected the Authority's arguments regarding email 2 and he questioned why it had been unable to locate information within the timescale he had specified. In his view, it was clear that email 2 was a response to a previous email, but the Authority had failed to locate it. The Commissioner required the Authority to carry out further searches, focusing on the metadata contained in email 2 and on the time period between 6 October 2021 and 9 February 2022.
28. In response, the Authority asked its IT department to carry out searches for the information specified by the Commissioner, and it identified a further eight documents, including correspondence which appeared to precede email 2, and a number of emails sent between 6 October 2021 and 9 February 2022. By way of explaining the discovery of these emails, the Authority submitted that some of the emails were not identified by the Planning department as falling within the scope of the request as they were business emails, that is, they were forwarding the request for another person to process. The Authority questioned its Planning department about these emails and it submitted that the emails were not withheld intentionally, but rather they were missed as they had not searched for all parameters thoroughly. The Authority apologised for failing to identify these documents sooner. The Commissioner asked the Authority to disclose these documents to the Applicant, and it did so, with personal data redactions.
29. It is clear that the Authority's handling of the Applicant's request was poor. The initial response asked the Applicant to resubmit her request via an online form, the searches failed to identify 12 obvious documents, which were disclosed during the investigation, and the Authority claimed that all of the disclosed information comprised the Applicant's own personal data, which was not the case. The Commissioner understands why the Applicant questioned the thoroughness of the Authority's searches and the completeness of the initial disclosure.
30. The Commissioner is extremely dissatisfied with the quality and thoroughness of the searches carried out by the Authority. He notes that the Authority only found the 12 documents it identified during his investigation after repeatedly being asked to carry out further searches. Furthermore, the Authority could only locate four documents initially, before later identifying a further eight documents. It should have been obvious to the Authority that the information disclosed at each stage was incomplete and that further work should have been done. The Commissioner would draw the Authority's attention to [Module 2: Searching for, locating and retrieving information](#)¹ of his self-assessment toolkit, which gives authorities a tool which they can use to evaluate and, where necessary, improve practice in searching for, locating, identifying and retrieving information.
31. As the Authority failed to identify information that fell within the scope of the request in its response to the Applicant, and which it later disclosed, the Commissioner finds that the Authority failed to deal with the Applicant's request in accordance with regulation 5(1) of the EIRs. The Commissioner also finds that the Authority failed to disclose relevant information to the Applicant in line with the EIRs, which was a breach of regulation 5(1).

Decision

¹ <https://www.itspublicknowledge.info/module-2-searching-for-locating-and-retrieving-information>

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

He finds that by disclosing information that fell within the scope of the request, the Authority complied with the EIRs.

However, by failing to carry out a review within 20 working days and by failing to notify the Applicant of her right of appeal to the Commissioner in its original response, the Authority failed to comply with regulations 16(4) and 13(e) of the EIRs.

Furthermore, by failing to identify and disclose other information that fell within the scope of the request, and by failing to respond to the Applicant's request in line with the EIRs (for information which was not their own personal data) the Authority failed to comply with regulation 5(1) of the EIRs.

Given that the Authority disclosed the information to the Applicant during his investigation, the Commissioner does not require the Authority to take any action in respect of this failure in response to the Applicant's application.

The Commissioner also does not require the Authority to take any action in relation to the breach of regulation 5(1) with regard to its response to the Applicant's request. This failure has been recorded as a practice issue in the Commissioner's case management system and will be followed up with the Authority as part of the current intervention work being undertaken by the Commissioner's office.

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.

David Hamilton
Scottish Information Commissioner

10 May 2024

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).

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;

...

- (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.

...

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-

...

- (e) inform the applicant of the review provisions under regulation 16 and of the enforcement and appeal provisions available in accordance with regulation 17.

16 Review by Scottish public authority

...

- (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.

...

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

...