



Decision Notice 123/2024

Risks from public use of raised walkway

Authority: Aberdeen City Council

Case Ref: 202200948

Summary

The Applicant initially asked the Authority for safety, risk and insurance information relating to a raised walkway, before narrowing their request to a single risk register covering risks from its public use. The Authority stated that some of the information was otherwise accessible to the Applicant and that it did not hold a single risk register. The Commissioner investigated and found that the Authority failed to recognise the information as "environmental" information, that some, but not all, of the information requested was already publicly available and easily accessible and that the Authority failed to provide appropriate advice and assistance.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), 1(2), 1(4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 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) (Interpretation) (paragraphs (a), (c) and (f) of definition of "environmental information"); 5(1), (2)(a) and (b) (Duty to make environmental information available on request); 6(1)(b) and (2) (Form and format of information); 9(1) and (3) (Duty to provide advice and assistance)

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 21 March 2022, the Applicant made a request for information to the Authority. The Applicant asked for risk assessments, correspondence and sign-off documents relating to the design, safety evaluation, insurance and approval of a walkway over Union Terrace Gardens in Aberdeen.
2. The Authority responded on 27 May 2022. The Authority described its approach to consultation, design and approval of the walkway and provided an Approval in Principle (AIP) document, which it stated contained information relating to risks and hazards. The Authority also provided two weblinks¹ to 801 public documents, which it stated contained design, technical and operational information. The Authority applied section 38(1)(b) of FOISA in conjunction with 38(2A)(a) to personal data it withheld from the AIP document it provided and applied section 25(1) to the information accessible via the weblinks it provided.
3. Between May 2022 and July 2022, the Applicant corresponded with the Authority where they expressed their dissatisfaction with its response and provided further clarification of their request (specifically, that they were seeking a single risk register covering risks from public use). However, the Applicant asked that the Authority not carry out a review in terms of section 21 of FOISA. During this period, the Authority also provided advice and assistance to the Applicant to enable them to locate risk information within the AIP document it had provided.
4. On 31 July 2022, following various correspondence in the intervening months, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that they were dissatisfied with the Authority's decision for the following reasons:
 - they requested a single risk assessment describing public use risks, which was not satisfied by the information the Authority had provided
 - the Authority had linked them to 801 documents without providing appropriate guidance on where the single risk register they requested could be found
 - the Authority should admit that no single risk register document existed matching the criteria they described (i.e., describing public use risks), if that proved to be the case
 - the Authority's initial response to their information request was late.
5. The Authority notified the Applicant of the outcome of its review on 29 August 2022, upholding its original decision. The Authority explained that it considered the risk information requested was available and accessible within the AIP document and two weblinks it provided to the Applicant and that risk had been assessed throughout the project, which meant information related to risk was not contained in a single risk assessment. The Authority also acknowledged its late initial response, which it attributed to staff turnover and needing information from external design consultants.

¹ <https://publicaccess.aberdeencity.gov.uk/online-applications/applicationDetails.do?activeTab=summary&keyVal=OPFNO6BZ01U00> and <https://publicaccess.aberdeencity.gov.uk/online-applications/applicationDetails.do?activeTab=summary&keyVal=OPFNLQBZ01U00>

6. On 29 August 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant was dissatisfied with the outcome of the Authority's review for the following reasons:
 - they believed a single risk matrix describing risks relating to public use of the walkway did exist
 - the AIP document disclosed provided construction-phase risks only and did not satisfy their request.
 - the Authority directed them to approximately 800 documents, which were not searchable, and it did not provide them with adequate guidance on how to locate the information they had requested
 - they were unhappy with the Authority's late initial response.

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 5 October 2022, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments.
9. The case was subsequently allocated to an investigating officer.
10. The investigating officer invited the Authority to answer specific questions and it provided submissions in response to these questions.

Commissioner's analysis and findings

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

Handling of the request – FOISA or the EIRs

12. In [Decision 218/2007](#), the Commissioner confirmed (at paragraph 51) that, where environmental information is concerned, there are two separate statutory frameworks for access to that information and, in terms of the legislation, an authority is required to consider the request under both FOISA and EIRs.
13. In this case, the Authority handled the request under FOISA rather than the EIRs. The investigating officer invited comment from the Authority on whether it believed the request ought to have properly been considered under the EIRs, given the nature of the information requested.

The Authority's submissions

14. The Authority explained that it had originally viewed this request as seeking information that it considered did not directly impact on the environment, but now accepted that this interpretation may have been limited.
15. However, the Authority noted that responding to the request under the EIRs, as opposed to FOISA, would have made no material difference to the outcome as it would have substituted the provisions it relied on under FOISA for the analogous provisions under the EIRs.

The Commissioner's view

16. The Commissioner is satisfied that any information falling within the scope of the request is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs (paragraphs (a), (c) and (f) are reproduced in Appendix 1 to this decision).
17. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs.
18. The exception in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of any information held should be more likely under FOISA than under the EIRs.
19. The Commissioner therefore concludes that the Authority failed to identify the information as environmental information in terms of regulation 2(1) of the EIRs, at the time of asking, and thereby failed to comply with regulation 5(1) of the EIRs.
20. In what follows, the Commissioner will therefore consider this case solely in terms of the EIRs.

Existence of a 'single risk register'

21. 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 any 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 (but which it does not in fact hold).
22. On receipt of a request for environmental information, therefore, 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 provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
23. 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.
24. The Commissioner also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. Ultimately, however, the Commissioner's role 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

25. The Authority explained that it passed the initial information request to the relevant project team and project engineer, given their principal involvement in the Union Terrace Gardens project.
26. The Authority stated that this team located the AIP document and undertook additional searches of Outlook and SharePoint (the primary means of storing and sharing information in relation to this project, including with outside parties) using search terms it considered likely to identify relevant information and targeting specific individuals it considered likely to hold relevant information.
27. The Authority also noted, at review stage, the review panel members obtained input from a representative of the relevant service to understand how risk assessment had been undertaken in relation to the walkway (i.e., to establish whether a single risk register was held).
28. The Authority confirmed that it therefore did not hold a single risk register of the type requested by the Applicant as there had been a requirement to assess risk throughout the project, which meant that specific risk information was contained within the AIP document and throughout the documentation in the two weblinks it provided to the Applicant.

The Applicant's submissions

29. The Applicant stated that they believed the Authority did hold a single risk register describing risks from public use of the walkway and noted that it had previously produced similar documents in other areas (which they could provide examples of).

The Commissioner's view

30. Having considered all relevant submissions and the terms of the request, the Commissioner is satisfied that the Authority took adequate and proportionate steps in the circumstances to establish whether it held a single risk register of the type requested by the Applicant.
31. Given the nature of the information requested and the submissions provided, the Commissioner is satisfied that the Authority does not hold a single risk register of the type requested by the Applicant.
32. While the Applicant believed and expected the single risk register to be held by the Authority, the Commissioner is satisfied that this was not the case. Whether a public authority should hold information which it does not hold is not a matter for the Commissioner to decide.

Regulation 6(1)(b) – Information already publicly available

33. Regulation 6(1)(b) of the EIRs states that, where an applicant requests that information is made available in a particular form or format, a Scottish public authority shall comply with that request unless the information is already publicly available and easily accessible to the applicant in another form or format.
34. In order to determine whether the Authority dealt with the request correctly, therefore, the Commissioner must be satisfied as to whether, at the time it responded to the Applicant's request and requirement for review, the information held by the Authority (and which fell within the scope of the request) was both publicly available and easily accessible to the Applicant in another form or format.

35. As noted above, the Applicant sought a single risk register addressing risks from public use of the walkway. However, the Authority stated that such a register did not exist and that information relating to risk was accessible throughout the AIP document and the documentation accessible via the two weblinks it provided to the Applicant.
36. The Authority provided the Applicant with specific page numbers relating to risk within the AIP document but did not provide them with any specific detail as to where that information could be found within the two weblinks it provided, which hosted a total of 801 documents.
37. The Applicant noted that the two weblinks provided by the Authority did not have the facility to search for key terms, which meant they had to open and search each document individually.
38. Despite being invited to do so by the Commissioner, the Authority did not identify specific risk information available to the Applicant within the two weblinks it provided to them (by, for example, providing document titles or specific hyperlinks).

The Commissioner's view

39. Given that the Authority supplied specific page numbers to the Applicant relating to risk within the AIP document, the Commissioner is satisfied that this information was readily accessible to the Applicant.
40. Consequently, the Commissioner considers that the Authority would have been entitled to rely on regulation 6(1)(b) of the EIRs in relation to the information contained within the AIP document.
41. However, the Commissioner does not consider that the Authority would have been entitled to rely on regulation 6(1)(b) of the EIRs in relation to the information relating to risk contained within the two weblinks it provided to the Applicant.
42. The investigating officer accessed the two weblinks provided by the Authority to the Applicant to establish whether information relating to risk was readily accessible. In the absence of specific detail as to where that information could be found and given the volume of the documentation provided, the relevant information proved not to be readily accessible by any measure. For example, the investigating officer noted that:
 - “risk” appeared as a term in a number of documents
 - references to risk and risk mitigations in those documents were broad, rather than describing specific risks and mitigations
 - with one exception, references to risk related to what would reasonably be considered construction or flood risks
 - risk information relating to public use (opposed to construction risks) was only identified in one instance, regarding the risk of vandalism to a lift connected to a walkway²
 - the documents had to be opened and searched individually, which was very time-consuming.

² Union Terrace Gardens Planning: Design and Access Statement [5422-LDA-00-XX-RT-L-9004]. Point 2.2.2 <https://publicaccess.aberdeencity.gov.uk/online-applications/applicationDetails.do?activeTab=documents&keyVal=OPFNO6BZ01U00>

43. In the Commissioner's view, regulation 6(1)(b) of the EIRs is not intended to prevent or inhibit access to information, but rather to relieve public authorities of the burden of providing information the requester can access readily without asking for it. None of the information to which the Authority would have applied regulation 6(1)(b) can be said to fall into this category, given the challenges described above.
44. In all the circumstances, on the basis of the submissions he has been given and the further research he has carried out by way of verification, the Commissioner is not satisfied that the Authority would have been entitled to rely on regulation 6(1)(b) of the EIRs in relation to the information relating to risk contained within the two weblinks it provided to the Applicant.
45. Consequently, the Commissioner requires the Authority to conduct further searches – which must be comprehensive and robust – of the documents available via the two weblinks in question to identify all of the information within the scope of the Applicant's request (i.e., relating to risks from public use) and to disclose this information to the Applicant.
46. The Commissioner must also question whether the Authority has complied with its duty under regulation 9(1) of the EIRs (Duty to provide advice and assistance) in relation to this information.

Regulation 9(1) of the EIRs – duty to provide advice and assistance

47. Regulation 9(1) of the EIRs requires Scottish public authorities to provide advice and assistance to applicants, so far as it would be reasonable to expect them do so.
48. Regulation 9(3) provides that a Scottish public authority shall be taken to have complied with this duty if it conforms to the guidance contained in the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs (the Section 60 Code)³.
49. At point 9.5, the Section 60 Code provides that:

“The authority should not assume that the applicant will know where and how the information can otherwise be obtained. If the information is already publicly available (e.g. on the authority's website) the authority should tell the applicant how to access it and provide adequate signposting, for example, providing direct links to online information. In all cases the authority should bear in mind its general duty to provide advice and assistance to applicant.”

The Commissioner's view

50. In the absence of any further information from the Authority identifying where the risk information could be located, the Commissioner considers that providing the Applicant with two links to webpages hosting 801 documents without indicating where the specific information requested could be found was not consistent with the spirit, or even the letter, of the EIRs.
51. Consequently, the Commissioner finds that the Authority failed to comply with regulation 9(1) of the EIRs.
52. The Commissioner notes this failure with considerable disappointment, given the Authority's apparent failure to learn from his findings in [Decision 112/2017](#)⁴ (particularly paragraph 41),

³ [Code of Practice under section 60 of FOISA \(www.gov.scot\)](#)

⁴ <https://www.itspublicknowledge.info/decision-1122017>

where it had also provided links to sizeable documents without specifying where in those documents the relevant information could be found.

Procedural matters – late response

53. The Authority provided its substantive response to the Applicant's original March 21, 2022 information request on 27 May 2022 – more than nine weeks after the request.
54. The Authority apologised for this late response in its review response of 29 August 2022 and provided an explanation to the Applicant.
55. The Authority expanded on this explanation in its submissions to the Commissioner, where it attributed the delay to a number of factors, including:
 - key staff having left
 - security protocols had restricted access to ex-employee accounts and delayed the information-gathering process
 - it was reliant on information from external third parties, some of whom had also left their posts.
56. While the Commissioner acknowledges the explanation provided by the Authority, he would like to remind the Authority that it has a statutory obligation to respond to requests for information under FOISA and the EIRs within the prescribed timescales and that needing to get information from external consultants is particularly not an excuse for not meeting those timescales.

Decision

The Commissioner finds that the Authority failed to comply with the Environmental Information (Scotland) Regulations 2004 (EIRs), in particular regulation 5(1) and regulation 9(1), in responding to the information request made by the Applicant.

Firstly, the Authority failed to identify the information as environmental information in terms of regulation 2(1) of the EIRs, and so failed to deal with the request under the EIRs.

Secondly, the Authority wrongly withheld some information on the basis it was publicly available and easily accessible to the Applicant

Thirdly, the Authority failed to provide the Applicant with appropriate advice and assistance as to where the information they requested could be located within the two weblinks it provided.

The Commissioner therefore requires the Authority to search for and to disclose to the Applicant all information relating to risks from public use contained within the two weblinks it previously provided to them, by **2 August, 2024**.

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.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

David Hamilton
Scottish Information Commissioner

18 June 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.”
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (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.
- ...

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;

...

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

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)-

(a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and

(b) is subject to regulations 6 to 12.

...

6 Form and format of information

- (1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-
...
 - (b) the information is already publicly available and easily accessible to the applicant in another form or format.
- (2) Where a Scottish public authority relies on a provision of paragraph (1) not to make the information available in the form or format requested it shall-
 - (a) give its reasons for that decision as soon as possible and in any event no later than 20 working days after the date of receipt of the request for the information;
 - (b) give its reasons in writing if the applicant so requests;
 - (c) inform the applicant of the review provisions under regulation 16 and of the enforcement and appeal provisions available in accordance with regulation 17.

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.
...
- (3) To the extent that a Scottish public authority conforms to a code of practice under regulation 18 in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with the duty imposed by paragraph (1) in relation to that case.
...