



Decision Notice 145/2024

Clearing of windblown trees

Authority: Scottish Forestry

Case Ref: 202200535

Summary

The Applicant asked the Authority for information about the clearing of windblown trees. 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 information that fell within the scope of the request.

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); 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”) (Interpretation); 5(1) (Duty to make environmental information available on request); 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 January 2022, the Applicant made a request for information to the Authority. He asked for all recorded data, including any emails, in relation to the clearing of wind blow trees at Glenormiston Estate, Innerleithen, Peeblesshire over the recent holiday period.

The Applicant explained that he understood the work, carried out by a named agent on

behalf of two landowners, started on or about 31 December 2021, and was completed 10 to 12 days later.

2. The Authority responded on 24 February 2022, advising the Applicant that the information requested was environmental information and would fall to be dealt with under the EIRs. As such, it told him it was applying the exemption at section 39(2) of FOISA and it explained the public interest reasons for doing so. The Authority disclosed some information to the Applicant and withheld other information on the basis that it was personal data relating to a third party. It withheld this personal data under regulation 11(2) of the EIRs.
3. On 1 March 2022, the Applicant wrote to the Authority requesting a review of its decision because he considered the disclosed information was incomplete. He asked the Authority to consider his request for review, and to put in steps to provide all the requested data.
4. The Authority notified the Applicant of the outcome of its review on 28 March 2022. The Authority concluded the original decision should be confirmed without modifications. The Authority confirmed that only personal data had been withheld (by application of regulation 11(2)) and that it considered this to be appropriate. The Authority also stated its view that there were no missing documents from the information that had been disclosed, although it acknowledged that the documents were numbered and that some numbers in the sequence were not included. In explaining its approach to numbering the documents, it stated:

This is often done when collating a large number of documents from various sources. We will assess them for duplicate information (i.e. where we get multiple copies of emails) or information which isn't relevant to the request, such as an exchange on an email chain related to a wholly different issue. These documents were removed and could give the impression that some in the sequence were missing. However, I am satisfied that these weren't related to your request.
5. The Applicant sent a formal complaint to the Authority in which he raised his specific concerns about its activities and the issuing of the felling licences. On 21 April 2022, in its response to this complaint, the Authority disclosed further information within the scope of the Applicant's information request.
6. On 9 May 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 that the information he had been given was incomplete.

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 23 November 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.

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 processed and responded to the Applicant's request and requirement for review in accordance with the EIRs.
12. When information falls within the definition of "environmental information" in regulation 2(1) of the EIRs, a person has the 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.
13. 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) 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) – Duty to make environmental information available

14. 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. This obligation relates to information that is held by the authority when it receives a request.
15. 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 – 12 applies (regulation 5(2)(b)).

Information disclosed by the Authority

16. After the Authority had completed its review outcome, it provided copies of the signed pages of the felling licenses to the Applicant (these were not provided in the original response or review outcome) in response to a complaint he had made. During the Commissioner's investigation, the Authority disclosed further information to the Applicant, which consisted of video and photographs that it had originally withheld.

Has the Authority identified all relevant information?

The Applicant's submissions

17. The Applicant argued that the information originally disclosed by the Authority was incomplete. He explained that documents disclosed to him had been redacted as expected (in regard to personal data under regulation 11(2) of the EIRs), but that page 6 of the application form for each felling licence was a blank page, rather than the signed and dated declarations he had expected to see. The Applicant noted that the Authority only provided him with signed and dated copies of page 6 of each felling license after he'd made a separate complaint, following the Authority's review outcome.
18. The Applicant acknowledged that the Authority had disclosed additional information to him during the Commissioner's investigation (the video and photographs) but he was not satisfied with this disclosure. He argued that the Authority's initial failure to disclose the signed felling licenses led him to conclude that it had not followed proper procedures, and so he had been

compelled to make a complaint on this basis, after which, the Authority then disclosed the signed pages. He noted that it took the Authority a further two years (after receipt of his information request) before it disclosed additional information falling within the scope of his request (the photographs and video). The Applicant argued that he should not have to spend two years making repeated enquiries and appealing to the Commissioner in order for the Authority to comply with its duties under the EIRs.

The Authority's submissions

19. The Authority explained how it had carried out searches for information that fell within scope of the request. It submitted that the information management and storage systems most likely to hold information relevant to the request were; Casebook, shared drives, Outlook and ERDM. The Authority also explained how felling permission applications are received and processed, and how information relating to that process is stored. It provided details of the officials who carried out the searches.
20. The Authority acknowledged that its original searches had failed to identify all of the information that fell within scope of the request, and that further information had been identified after the completion of the review. The Authority submitted that, when responding to the request and review, officials were under significant pressure from the volume of urgent tree felling work required to address damage arising from Storm Arwen and that, in all probability, it was likely that the signed declaration form was removed in error having been considered a duplicate of the unsigned declaration form.
21. During the investigation, the Authority was asked further specific questions regarding its searches and with particular reference to some of the previously disclosed information, to establish whether all the information within scope of the request had been identified by the Authority.
22. In response, the Authority explained that all relevant information that had been previously identified was held in Casebook and the shared S: drive, and that any information that would have been held in Outlook at the time of the request would now be held in Casebook. The Authority submitted that it did not hold any information relevant to the request in ERDM.
23. The Authority stated that it does not routinely keep a record of telephone calls, nor of site visits for felling permissions. In particular, the Authority submitted, no such records would have been kept for those specific felling permissions that were the subject of the request because they were part of the Fast Track process set up to deal with the aftermath of significant wind blow damage from Storm Arwen.
24. The Authority stated that it was not aware of any meetings (in person, or virtual) having taken place in relation to the subject of the request. The Authority commented that it could not say for certain that no meetings took place, as the people who worked there have moved on or retired, but it confirmed that it did not hold any recorded information in relation to any meetings.
25. The Authority also submitted that it did not use any informal messaging or discussion platforms for formal casework.
26. As noted above, the Authority did identify additional information within the original casefile, including photographs and video, that was not disclosed previously. However, because the lead case handler had since left the Authority, and no record of the original searches or decision making around the identified information had been kept, the Authority explained that it was unable to ascertain why this documentation had not been disclosed to the Applicant.

27. The Authority disclosed the photographs and video to the Applicant on 8 March 2024.

The Commissioner's conclusions

28. The Authority has acknowledged that its original searches did not identify all the information it held at, or before, the review, and the Commissioner notes that some information was not identified and disclosed to the Applicant until two years after the Applicant had made his information request.
29. The Commissioner has considered the submissions made by the Authority as to why the signed pages of the felling licenses were overlooked initially, and how the change of staff has meant that it has no clear explanation as to why the photos and video were not identified at the time of the request. He notes the Authority's arguments regarding the incredible volume of work that followed Storm Arwen, but none of this is a consolation to the Applicant who had to wait two years to obtain information that the Authority did not disclose at the time, but which also was not withheld under any exception in the EIRs.
30. The Commissioner is not satisfied with the Authority's handling of the Applicant's request. The Authority has failed to record the searches that were carried at the time of this request, and it has been unable to explain why certain information was not identified and disclosed to the Applicant earlier.
31. The Commissioner considers that the quality and thoroughness of the searches carried out by the Authority was poor. It should have been obvious to the Authority that the information disclosed 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.
32. Despite these failings by the Authority, by the end of the investigation the Commissioner was satisfied that the Authority had identified (and disclosed) all of the information falling within the scope of the Applicant's information request. However, he understands why the Applicant questioned the thoroughness of the Authority's searches and the completeness of the information it disclosed to him.
33. 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 also a breach of regulation 5(1).

Decision

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

He finds that in failing to make available all the information it held within scope of the request, the Authority failed to comply with regulation 5(1) of the EIRs.

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

Given that the Authority disclosed the relevant information during the investigation, subject to redactions for personal data under regulations 11(1) and 11(2) of the EIRs, the Commissioner does not require the Authority to take any action in response to this failure.

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

01 July 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.

...

- (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

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(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.

...

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

...