



Scottish Information
Commissioner
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Decision Notice 176/2024

Listed building consents for cemetery works

Authority: Scottish Borders Council

Case Ref: 202200572

Summary

The Applicant asked the Authority for listed building consents for work commencing on specific cemeteries on 7 March 2022. The Authority refused to comply with the request, stating the information was already publicly available on its planning portal. The Commissioner investigated and found that the Authority did not hold the information and was therefore wrong to refuse to comply with the request on the basis the information was publicly available.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) 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”, “the applicant” and “the Commissioner” and paragraphs (a), (c) and (f) of the definition of “environmental information”) (Interpretation); 5(1) (Duty to make environmental information available on request); 6(1)(b) (Form and format of information); 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 9 March 2022, the Applicant made a request for information to the Authority. The Applicant asked for the listed building consents for work commencing on 7 March 2022 on the following cemeteries: Bedrule, Cavers, Crailing, Hobkirk, Hownam, Kirkton, Minto, Oxnam, Robertson, Saughtree and Teviothead.
2. The Authority responded on 7 April 2022 in terms of the EIRs and refused to provide the information requested on the basis it was publicly available via its planning portal.
3. On 7 April 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 knew how to access listed building consents on the Authority's planning portal and he wanted the Authority to provide the listed building consents for the cemeteries he specified.
4. The Authority notified the Applicant of the outcome of its review on 17 May 2022, fully upholding its original decision. The Authority explained that any applications for listed building consents would be publicly available on its planning portal for the Applicant to access but noted that where such consent was not required, or an application had not been made, then there would be no public record.
5. On 17 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 the Authority refused to state that it did not hold the information and instead told him it was publicly available for him to access, when he believed it knew listed building consents for the specified cemeteries did not exist.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 15 June 2022, the Authority was notified in writing that the Applicant had made a valid application and the case was subsequently allocated to an investigating officer.
8. 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 whether the Authority confirmed it held the information before advising the Applicant it was publicly available, how it established what information it held and why it considered the information was both publicly available and easily accessible.

Commissioner's analysis and findings

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

Handling in terms of the EIRs

10. It is clear that any information falling within the scope of the Applicant's request, which relates to listed building consent for works on cemeteries, is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs (the relevant provisions are reproduced in Appendix 1 to this decision).
11. The Applicant made no comment on the Authority's application of the EIRs in this case and the Commissioner will consider the request in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs

12. 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.
13. As mentioned above, in responding to the Applicant's requirement for review, the Authority relied upon the provisions of regulation 6(1)(b) of the EIRs, on the basis that the information requested was publicly available on its planning portal.
14. Regulation 6(1)(b) of the EIRs, provides that a Scottish public authority shall comply with a request that environmental information be made available in a particular form or format, *unless* the information is already publicly available and easily accessible to the applicant in another form or format. This is a two-part test, which must (for the regulation to apply) conclude that the information is both publicly available and easily accessible.
15. In order to determine whether the Authority dealt with the Applicant's request correctly, the Commissioner must be satisfied as to whether, at the time it received the request, all the information held by the Authority (and which fell within the scope of the request) was both publicly available and easily accessible.

The Authority's submissions

16. The Authority stated that listed buildings consent is considered a planning application and, as such, any paperwork in relation to any such consent would be publicly available on its planning portal.
17. The Authority explained that it therefore did not carry out searches at the time of the request because the information, if it existed, would be publicly available on the planning portal for the Applicant to view himself.
18. The Authority confirmed that it subsequently carried out searches of its planning portal and established that the listed building consents sought by the Applicant do not exist.
19. The Authority also noted that it would seek to apologise to the Applicant if the Commissioner found that it had erred when responding to his request.

The Applicant's submissions

20. The Applicant explained that he believed the information he requested was not held and that the Authority falsely told him it is publicly available when it knows it does not, in fact, exist.

The Commissioner's view

21. Given the Authority has confirmed it does not hold the information requested (which the Commissioner is satisfied is true), it cannot have met the test set out above, in paragraph 15,

as the information was not (and is not) held and therefore was not (and is not) publicly available.

22. With that in mind, the Commissioner considers the Authority was not entitled to respond to the Applicant's request in terms of regulation 6(1)(b) of the EIRs.
23. The Commissioner is critical of the Authority's decision to not, at the time of the request, carry out searches to establish whether it actually held the information before applying regulation 6(1)(b). He would like to remind public authorities that the aforementioned regulation (and its counterpart under section 25 of FOISA) can only properly be applied where it is established that the information in question is already publicly available (i.e., actually held) and easily accessible.

Decision

The Commissioner finds that the Authority was not entitled to respond to the Applicant's request in terms of regulation 6(1)(b) of the EIRs and that, by doing so, it failed to comply with the Environmental Information (Scotland) Regulations 2004 (and, in particular, with regulation 5(1)).

The Commissioner therefore requires the Authority to provide a fresh response to the Applicant's requirement for review, other than in terms of regulation 6(1)(b) of the EIRs, by 14 October 2024 (in which the Authority should also, as it has indicated it is open to doing, apologise to the Applicant for how it responded to his information request).

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

27 August 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.

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.

...

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.

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

...