Decision Notice 188/2024

Shawlands Arcade Redevelopment

Authority: Glasgow City Council
Case Ref: 202200483

Summary

The Applicant asked the Authority for information related to the redevelopment of Shawlands Arcade in Glasgow. The Authority refused to respond to the request under the terms of regulation 10(4)(b) of the EIRs, because it considered the cost of doing so would be significantly burdensome and that the request was manifestly unreasonable. The Commissioner investigated and found that the request was not manifestly unreasonable. He required the Authority to respond to the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) section 47 (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); 10(4)(b) (Exceptions from duty to make environmental information available); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

Background

1. On 16 September 2021, the Applicant made a request for information to the Authority. He asked for all emails and attachments from 1 January to 30 June 2021 relating to the redevelopment of Shawlands Arcade, also identified as the site bound by Eastwood Avenue/Kilmarnock Road/Pollokshaws Road in Glasgow.
2. The Authority responded on 13 October 2021, noting that the Applicant had made two similar requests previously which were refused on the basis that the cost to the Authority of

responding would be “manifestly unreasonable”. It acknowledged that the Applicant had tried to reduce the scope of his request by narrowing the timeframe, but it considered that complying with the request would still incur excessive costs. For these reasons, the Authority refused the request under regulation 10(4)(b) of the EIRs. The Authority offered to discuss the matter with the Applicant, and it extended an invitation to meet with the Applicant on the redevelopment site.

3. On 13 October 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant was dissatisfied that the Authority refused to supply him with the information he had requested. He noted that this latest refusal suggested that no matter how much he limits the scope of his request, the Authority will still refuse to provide the information. He rejected the offer of meeting with a planning official, stating that he wanted the information held by the Authority, not the information held by a single Authority employee.

4. The Authority notified the Applicant of the outcome of its review on 10 November 2021. The Authority upheld the original response without modification.

5. On 27 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 he was dissatisfied with the outcome of the Authority’s review because, in his view, the Authority should have been able to provide the information.

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 31 May 2022, the Authority was notified in writing that the Applicant had made a valid application.

8. The case was subsequently 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. The questions sought the Authority’s views on why it considered the cost of responding to the request to be manifestly unreasonable.

Commissioner’s analysis and findings

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

Application of the EIRs

11. The [Commissioner’s briefing on the definition of environmental information](https://www.itspublicknowledge.info/sites/default/files/2022-03/EIRBriefingsDefinition.pdf)[1] advises that planning matters are likely to fall principally within the definition of measures (including administrative measures) in part (c) of the definition of environmental information. The Applicant’s request sought information about the pre-application discussions relating to

[1] https://www.itspublicknowledge.info/sites/default/files/2022-03/EIRBriefingsDefinition.pdf

redevelopment of an area of land currently occupied by buildings. The land was subject to a planning process under the Town and Country Planning (Scotland) Act 1997 and the administrative measures around that process. The Commissioner is therefore satisfied that the information requested falls within paragraph (c) of the definition in regulation 2(1) of the EIRs. The Applicant has not disputed this, and the Commissioner will consider the information 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.

13. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.

Regulation 10(4)(b) of the EIRs – Manifestly unreasonable

14. Under the exception in regulation 10(4)(b) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request for information is manifestly unreasonable. In considering whether the exception applies, the authority must interpret it in a restrictive way and apply a presumption in favour of disclosure. Even if it finds that the request is manifestly unreasonable, it is still required to make the information available unless, in all the circumstances, the public interest in doing so is outweighed by that in maintaining the exception.

15. The following factors are relevant when considering whether a request is manifestly unreasonable, that is, that the request:

    (i) would impose a significant burden on the public authority;

    (ii) does not have a serious purpose or value;

    (iii) is designed to cause disruption or annoyance to the public authority;

    (iv) has the effect of harassing the public authority;

    (v) would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.

16. This is not an exhaustive list. Depending on the circumstance, other factors may be relevant, provided the impact on the authority can be supported by evidence. The Commissioner recognises that each case must be considered on its merits, taking all the circumstances into account.

17. In its review outcome, the Authority explained that it had refused the request under regulation 10(4)(b) of the EIRs because it considered that responding to the request would impose a significant burden on the Authority.

18. In its submissions to the Commissioner, the Authority identified a total of 397 emails held by two officers of the Authority that fell within the scope of the request. It said the timeframe of the request covered a period when strict measures were in place due to the Covid-19 pandemic. The Authority explained that officers were working remotely during this period, with no access to work telephones, and accordingly there was an unusually high volume of email exchanges to arrange meetings with a significant number of internal and external individuals. The correspondence that it had identified as falling within scope of the request

contained both personal and commercially sensitive information that would require screening and redacting and that this would create significant extra work for the Authority.

19. The Authority explained that it had carried out a sampling exercise to examine the costs it said would be incurred in responding to the Applicant's request. It explained that, during this exercise, the officer considered 20 emails within scope of the request and that exercise took 1 hour and 55 minutes, which equated to 5.75 minutes per email. It explained that the time taken included marking for redaction but not the action of redaction. It said that the time taken to review all the emails in scope of the Applicant's request would therefore be "397 x 5.75 minutes = 2 282.75 minutes (38 hours and 2 minutes)".

20. The Authority submitted that responding to the request would therefore impose a significant burden on its resources as it would involve diverting a planning officer away from his core duties for more than 38 hours and that this would have a detrimental impact on its ability to continue to carry out its other statutory functions, particularly in relation to its Development Management Service.

21. The Applicant expressed his dissatisfaction that, despite narrowing the scope of his request, the Authority refused to provide the requested information on the basis of cost. He said that a recent upgrade to the Authority's email systems should have taken into consideration the requirements of FOISA, and that he felt the Authority was using costs to avoid compliance with the law.

The Commissioner's view on the exception

22. In the Commissioner's briefing on regulation 10(4)(b) of the EIRs[2], he says that a request will impose a significant burden on a public authority where complying with it would require a disproportionate amount of time, and the diversion of an unreasonable proportion of its resources, including financial and human, away from other statutory functions.

23. The Commissioner has carefully considered the submissions from the Applicant and the Authority.

24. It is clear from the Authority's submissions that it is arguing that making the information available would impose a significant burden on it. This would include, in the Authority's view, the diversion of an unreasonable proportion of its human resources away from other statutory functions.

25. Additionally, it is clear from the Applicant's submissions that he did not intend to impose a significant burden on the Authority and that he has, for the third time, followed the advice of the Authority and narrowed the scope of his request.

26. The Commissioner has examined the sampling exercise carried out by the Authority and specifically its submissions on the time taken to print, mark for redaction, scan and save each document. Having replicated the tasks for the sample documents, he cannot understand why it would take the case officer in the Authority, on average, 5.75 minutes per email to carry out these tasks. The Authority has not provided sufficient evidence to demonstrate to the Commissioner that its stated timings for these tasks are reasonable.

27. The Commissioner acknowledges the Authority's concerns about diverting the planning officer's time away from his core functions. The request may be inconvenient and may well

[2] https://www.itspublicknowledge.info/sites/default/files/2023-07/BriefingRegulation104bManifestlyUnreasonableRequests.pdf

stretch the resource of the Development Management Service. Nonetheless, these factors are not, on their own, sufficient to deem a request manifestly unreasonable.

28. Unlike FOISA, there is no cost limit to the duty to comply with a request for environmental information. Exceeding the £600 cost limit set under section 12(1) of FOISA may be relevant in considering whether a request is manifestly unreasonable for the purposes of the EIRs, but a request costing more than that to process does not necessarily fall into that category. Regulation 10(4)(b) sets a separate test, of real substance, against which each request needs to be considered individually. The Commissioner takes the view, having considered the amount of information that the Authority has identified as falling within scope of the request and all other relevant circumstances, that it should be possible to provide a response to the Applicant without engaging the exception.

29. Taking regard of all the circumstances and the supporting evidence, the Commissioner considers the Authority has failed to demonstrate that responding to the request would impose the significant burden claimed, certainly to the point where the request could legitimately be considered manifestly unreasonable. He finds that the Authority was not, therefore, entitled to rely on the exception in regulation 10(4)(b) of the EIRs in refusing to make information available to the Applicant.

30. As the Commissioner is not satisfied that the Authority was entitled to rely on the exception in regulation 10(4)(b) of the EIRs, he is not required to go on to consider the application of the public interest test in regulation 10(1)(b) of the EIRs.

Decision

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

He finds that the Authority was not entitled to rely on the exception in regulation 10(4)(b) of the EIRs for information which would fulfil the Applicant's request and therefore failed to comply with regulation 5(1) of the EIRs in refusing to respond to the request.

The Commissioner therefore requires the Authority to provide a fresh response to the Applicant's requirement for review, other than in terms of regulation 10(4)(b), by **18 October 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.

Euan McCulloch
Head of Enforcement

3 September 2024