



Scottish Information
Commissioner
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Decision Notice 213/2024

Information relating to the factoring of a specified building

Authority: Clackmannanshire Council

Case Ref: 202400281

Summary

The Applicant asked the Authority for information relating to the factoring of a specified building. The Authority provided some information in response to some parts of the request and stated that it held no relevant information for other parts of the request. The Commissioner investigated and found that the Authority's response complied with FOISA for one part of the request and failed to comply with FOISA for all other parts of the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 17(1) (Information not held); 36(1) (Confidentiality); 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); 10(4)(e) (Internal communications); 16 (Review by Scottish public authority); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

Background

1. On the 28 October 2023, the Applicant made a request for information to the Authority. The Applicant asked for information about the factoring of a specified building, including:

- (a) when the Authority became the factor of the building, and a copy of the postal letter sent to owners informing them of this
 - (b) when the Authority ceased to be the factor of the building
 - (c) why owners in the specified building were not informed of this change in factoring responsibility
 - (d) why the Authority ceased to be the factor despite remaining the majority owner of the specified building
 - (e) copies of (or links to) minutes of all meetings, and other information, discussing the factoring of shared ownership blocks (unless these only applied to other blocks than the specified building).
2. The Authority did not respond to the information request.
 3. On 15 and 17 December 2023, the Applicant wrote to the Authority requiring a review in respect of its failure to respond.
 4. The Applicant did not receive a response to their requirement for review.
 5. The Applicant wrote to the Commissioner on 20 January 2024, stating that they were dissatisfied with the Authority's failure to respond, and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
 6. [In Decision 025/2024](#)¹, the Commissioner found that the Authority had failed to respond to the Applicant's request for information and requirement for review within the timescales laid down by sections 10(1) and 21(1) of FOISA.
 7. The Authority notified the Applicant of the outcome of its review on 12 February 2024. The Authority provided information for parts (a), (b) and (d) of the request and issued the Applicant with a notice, under section 17(1) of FOISA, that it did not hold the information requested for parts (c) and (e) of the request.
 8. On 20 February 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated they were dissatisfied with the outcome of the Authority's review for the following reasons:
 - for part (a) of the request, the Authority had failed to provide the letter requested despite stating it was attached to its response
 - for parts (b) and (d), they expected that the Authority held further information (particularly emails, correspondence and minutes of meetings)
 - for parts (c) and (e), they expected that the Authority held information (particularly emails, correspondence and minutes of meetings)
 - for part (e), they considered the Authority had misinterpreted the request by responding in terms of information that *only* referred to the specified building, when they had asked for all information unless it referred only to blocks other than the specified building.

¹ <https://www.foi.scot/decision-0252024>

Investigation

9. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
10. On 11 March 2024, the Authority was notified in writing that the Applicant had made a valid application.
11. On 2 April 2024, the Authority sent an email to the Applicant attaching the letter relevant to part (a) of the request that was missing from its review outcome. The Authority also explained that:
 - it was unable to find any formal record of the Authority's decision not to renew its registration as a factor for the specified building. The Authority explained that it was a decision of the Housing Service, after discussions with relevant parties, not to continue with registering the Authority as a factor for the specified building.
 - it would have been appropriate for the Authority to have notified owners affected by this, and it apologised that this was not done
 - it appeared that legal opinion within the social housing profession had developed a consensus view that social landlords were not required to register as a factor for mixed tenure accommodation blocks in which they had an interest.
12. As part of its email dated 2 April 2024, the Authority also stated that it was applying the exemption in section 36(1) of FOISA and the exception in regulation 10(4)(e) to withhold "emails".
13. The case was subsequently allocated to an investigating officer.
14. 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 provide the information it was withholding under section 36(1) of FOISA and regulation 10(4)(e) of the EIRs, to comment on this application and to answer specific questions. These related to the Authority's interpretation of the request, the searches it had undertaken to establish what information it held, whether it considered the information requested was environmental information and its application of the exemption in section 36(1) of FOISA and the exception in regulation 10(4)(e) of the EIRs.
15. The Authority confirmed that it had no further comments to make. The Authority did not provide the Commissioner with the withheld information.

Commissioner's analysis and findings

16. The Commissioner considered the submissions made to him by the Applicant and Authority.

The Authority's handling of the request and change of position during the investigation

The Applicant's submissions

17. The Applicant expressed concern with the information located by the Authority as they believed it held more information than it had disclosed for parts (b) and (d) of their request and that it held relevant information for parts (c) and (e).

18. Specifically, the Applicant stated that:
- for parts (b), (c), (d) and (e) of their request, they expected that the Authority held emails, correspondence and minutes of meetings
 - for part (d) of their request, the response provided indicated that there was a significant amount of discussion with other bodies and within the Authority.
19. The Applicant also considered that the Authority had misinterpreted part (e) of their request, which was for all information unless it specifically referred *only* to other blocks. In other words, the request was not for information that *only* referred to the specified building in their request.

The Authority's submissions

20. As rehearsed earlier, the Authority was provided an opportunity to provide comments on the Applicant's application, but it confirmed that it had no further comments to make. The Authority also did not provide the Commissioner with the information it was now withholding from the Applicant.

The Commissioner's view

Interpretation of the request and the searches undertaken

21. Having considered the terms of the request, the Commissioner is satisfied that, by the end of the investigation, the Authority adequately responded to parts (a) and (b). Both parts are specific – they seek when the Authority became the factor of the specified building, when it ceased to be the factor of the specified building and a specified letter.
22. However, in not disclosing the letter specified in part (a) of the request until during the investigation, the Authority failed to comply with section 1(1) of FOISA.
23. The Commissioner recognises that the Applicant expected the Authority held emails, correspondence and minutes of meetings relating to part (b) of the request. However, given the specific terms of part (b) of the request, the Commissioner is satisfied that the Authority's response was appropriate.
24. Having also considered the terms of parts (c), (d) and (e) of the request, the Commissioner considers that they are broader in scope than parts (a) and (b). Parts (c) and (d) requested information relating to *why* actions were taken, not simply *when* they were taken, while part (e) requested information relating to discussions of factoring of shared ownership blocks.
25. Given the broader scope of parts (c), (d) and (e) of the request, the Commissioner considers that, unlike part (b) of the request, the requested information may be held in emails, correspondence and minutes of meetings.
26. The Commissioner would expect the Authority to have searched those categories of information in response to parts (c), (d) and (e) of the request for any information falling within the scope of those parts of the request.
27. For part (e) of the request, the Commissioner notes that the Applicant did not request information that *only* referred to the specified building, but the Authority's review outcome stated that it held no documentation that "relates specifically to [the specified building]".
28. In view of this, the Commissioner considers that the Authority has failed to properly interpret part (e) of the request. The Commissioner therefore finds that the Authority failed to comply

with section 1(1) of FOISA, and in doing so provided an incomplete response to the Applicant.

29. In considering whether a Scottish public authority holds the requested information in any given case, the Commissioner must be satisfied that the authority has carried out adequate, proportionate searches in the circumstances, taking account of the terms of the request and all other relevant circumstances. He will consider the scope, quality, thoroughness and results of those searches, applying the civil standard of proof (the balance of probabilities).
30. In all cases, it falls to the public authority to persuade the Commissioner, with reference to adequate, relevant descriptions and evidence, that it does not hold the information (or holds no more information than it has identified and located in response to the request).
31. In this case, the Authority provided the Commissioner with no evidence of the searches it undertook in response to the request. The Commissioner cannot therefore be satisfied that the Authority has identified all requested information for part (d) of the request and he cannot uphold the Authority's claim that it does not hold any requested information for parts (c) and (e).
32. During the investigation, the Authority stated that it was now withholding information under section 36(1) of FOISA and regulation 10(4)(e) of the EIRs. However:
 - the Authority did not provide the withheld information to the Commissioner, despite a request that it do so
 - it is not clear what part(s) of the request the withheld information relates to
 - the information being withheld was apparently located after the Authority's review outcome
 - the Authority has seemingly withheld the same information under both FOISA and the EIRs
 - the Authority has offered no justification for why section 36(1) of FOISA or regulation 10(4)(e) of the EIRs apply.
33. In the circumstances, the Commissioner's view is that the Authority's handling of the request was so deficient that he must require it to reconsider parts (c), (d) and (e) afresh and provide the Applicant with a revised review outcome. In doing so, the Authority should:
 - consider carefully the terms of the request and ensure that its interpretation of the request is reasonable and fully addresses the request
 - ensure it takes adequate and proportionate steps to establish what information is held, using appropriate search terms and searching all locations and mediums where relevant information may be held
 - retain evidence of those searches in the event of a further appeal to the Commissioner
 - ensure it clearly identifies any information that is being withheld, specifies what part(s) of the request that information relates to and justifies and explains why that information is being withheld.

FOISA or EIRs?

34. It also seems likely from the subject matter of the request that at least some of the information caught by it will be environmental information, as defined by regulation 2(1) of the EIRs. During the investigation, the Authority seemingly recognised this by stating that it was withholding “emails” under 10(4)(e) of the EIRs (though it appears to have also withheld the same information under section 36(1) of FOISA).
35. In [Decision 218/2007](#)², 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
36. The Commissioner would therefore urge the Authority, when issuing its revised review response, to consider whether the information requested is environmental information as defined by regulation 2(1) of the EIRs. If the Authority considers that it is, to the extent that it is, it should issue its revised review outcome in terms of regulation 16 of the EIRs (applying the exemption in section 39(2) of FOISA where appropriate).

Decision

The Commissioner finds that the Authority partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that the Authority’s response to part (b) of the Applicant’s request complied with Part 1 of FOISA.

The Commissioner finds that the Authority’s response to all other parts of the Applicant’s request failed to comply with Part 1 of FOISA in the following respects:

- it failed to identify all information within the scope of the request
- for part (a), it failed to disclose a letter falling within the scope of the request until during the investigation
- for parts (c) and (e), it failed to satisfy the Commissioner that it did not hold any requested information
- for part (d), it failed to satisfy the Commissioner that it had identified all requested information
- for part (e), it failed to properly interpret the scope of the request

Given that, by the close of the investigation, the Commissioner was satisfied that the Authority fully responded to part (a) of the request, he does not require the Authority to take any action in response to this failure, in response to the Applicant’s application.

However, the Commissioner requires the Authority to carry out adequate, proportionate searches for the information requested for parts (c), (d) and (e) of the Applicant’s request, reach a decision on the basis of those searches and notify the Applicant of the outcome and of the searches it has undertaken (all in terms of section 21 of FOISA or, if the information is environmental information,

² <https://www.foi.scot/decision-2182007>

in terms of regulation 16 of the Environmental Information (Scotland) Regulations 2004), by 15 November 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.

Euan McCulloch
Head of Enforcement

1 October 2024