Decision Notice

Decision 015/2017: Mr Telford and North Ayrshire Council

Safety conditions: drainage pond and sediment trap in Fairlie

Reference No: 201601908
Decision Date: 27 January 2017

Scottish Information Commissioner

Summary

On 24 August 2016, North Ayrshire Council (the Council) was asked for evidence of the implementation of safety and maintenance measures required, in relation to a drainage pond and sediment trap, by the planning permission for a housing development in Fairlie. The Council disclosed information in response to the request.

The Commissioner was satisfied that the Council had disclosed all the information it held and which fell within the scope of the request.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a),(b), (c) and (f) of definition of "environmental information"); 5(1) (Duty to make available environmental information on request)

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 24 August 2016, Mr Telford made a request for information to the Council. This request referenced planning permission 12/00159/PPM, which relates to a housing development in Fairlie. Condition 3 of the permission relates to the provision of safety measures (including maintenance provision) for the attenuation feature (drainage pond) and sediment trap, to include details of who will be responsible for maintenance and safety. Mr Telford asked the Council to:

   "… confirm and provide evidence that the various safety matters have in fact been undertaken and are continuing."

2. The Council responded under the EIRs. It disclosed information to Mr Telford on 7 September 2016, by emailing seven PDF files pertaining to condition 3.

3. On 19 September 2016, Mr Telford wrote to the Council requesting a review of its decision. He complained that the information provided failed to confirm who would be responsible for maintenance and safety of the drainage pond, or whether the Council considered it was responsible for maintenance and safety of the sediment traps.

4. The Council notified Mr Telford of the outcome of its review on 18 October 2016. The Council upheld its initial response, directing Mr Telford to what it considered to be the relevant parts of the documents it had disclosed. It stated that it had provided Mr Telford with all the relevant information it held.

5. On 19 October 2016, Mr Telford wrote to the Commissioner. He applied to the Commissioner 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. Mr Telford stated he was dissatisfied with the outcome of the Council's review because he believed it failed to provide

clarity as to who would be responsible for maintenance and safety of the drainage pond and silt trap.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Telford made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.

7. On 24 November 2016, the Council was notified in writing that Mr Telford had made a valid application. The case was 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 Council was invited to comment on this application and answer specific questions, with particular reference to the searches carried out for any information it held.

9. The Council also provided submissions. It also identified a letter of 15 December 2016 relating to the implementation of the planning conditions for the development in question (including condition 3), which it shared with Mr Telford.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Telford and the Council. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

11. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs. Any information captured by the request would relate to the implementation of the planning permission for a significant development, and in particular to the implementation of arrangements for the management of waste and associated public safety issues. The Commissioner would consider paragraphs (a), (b), (c) and (f) of the definition of environmental information (all reproduced in Appendix 1) to be applicable.

12. Mr Telford has not taken issue with the handling of the request under the EIRs and the Commissioner will consider that handling in what follows solely in terms of the EIRs.

13. Regulation 5(1) of the EIRs requires a Scottish public authority that holds environmental information to make it available when requested to do so by any applicant. This is subject to various qualifications contained in regulations 6 to 12 (regulation 5(2)(b)).

14. It is worth noting here that this obligation extends to information actually held by an authority when it receives the request, as opposed to information which an applicant believes the authority should hold (but which is not actually held).

15. Under the EIRs, a Scottish public authority may refuse to make environmental information available if one of more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)). The authority must interpret the exceptions in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)).

16. In this case, the Council has not sought to apply any exceptions. Its position is that it supplied Mr Telford with all the information it held and which fell within the scope of his request.

17. 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. She also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore the applicant's expectations as to what information the authority should hold, ultimately 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).

Searches

18. In its submissions, the Council explained that searches were carried out by staff in its Planning and Roads services.

- Planning – a search of the IDOX system was conducted, based on the planning history and using the planning reference (cited in Mr Telford's request). This identified the information the Council disclosed to Mr Telford.
- Roads/Flooding – a search was conducted of its electronic filing system, using the planning reference. The Council confirmed that this was how it would expect the information sought by Mr Telford to be filed.

A search was also conducted of the Council's "Mail metre" system, which stores all the Council's old emails – this was also done using the planning reference.

19. In response to a query about whether legal files should also have been checked, the Council commented that its Legal service would not get involved in the detail of a planning application, such as the SUDs pond or the silt trap. The drainage pond information was identified in the planning permission documentation and the silt trap was linked to flood prevention (handled by the Roads service).

20. Having considered all the relevant submissions and the terms of the request, the Commissioner is satisfied in this case that the Council took adequate, proportionate steps to establish what information it held that fell within the scope of Mr Telford's request. On balance, she accepts that any information relevant to the request would have been identified using the searches described by the Council. She is satisfied that this information was identified and disclosed to Mr Telford, and that the Council did not, on receiving the request, hold any further information capable of addressing Mr Telford's request.

21. The Commissioner would reiterate that she can only consider what information is actually held by the Council, and not what information it should hold, or what an applicant believes it should hold. She notes Mr Telford's concern that the Council's earlier responses to him lacked the clarity he expected. She also notes his acknowledgement the letter of 15 December 2016, provided to Mr Telford during the investigation, provided the clarity he expected. That letter did not, of course, exist at the time of Mr Telford's request (or, for that matter, at the time of the Council's review). As it did not exist at the time the request was received by the Council, it could not be considered to be held by the Council for the purposes of this request.

22. It is apparent from the Council's responses to Mr Telford, initially and on review, that aspects of the implementation of condition 3 remained unresolved at these times. By the time of the letter of 15 December 2016, these outstanding matters would appear to have been resolved and the condition is described as having been discharged. If there was any lack of clarity in the Council's earlier responses to Mr Telford, it would appear reasonable to view that apparent failing in the context of an implementation process which remained ongoing.

Decision

The Commissioner finds that North Ayrshire Council complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Telford.

The Commissioner finds that by disclosing all the information it held, the Council complied with the EIRs.

Appeal

Should either Mr Telford or the Council 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.

Margaret Keyse
Head of Enforcement

27 January 2017

Appendix 1: Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

…

(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;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);

(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.

…

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