

Decision Notice



Decision 018/2011 Diana Neil, Chris and Penny Holland and Fife Council

Planning application

Reference No: 201001904

Decision Date: 31 January 2011

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

Kinburn Castle
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Summary

The applicants requested from Fife Council (the Council) information pertaining to a specific planning application. The Council responded by stating that the information was available online on the Council's website. Following a review, as a result of which further information was provided, the applicants remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which additional information was provided to the applicants, the Commissioner found that the Council had partially failed to deal with the applicants' request in accordance with the EIRs, on the basis that regulation 6(1)(b) of the EIRs (which states that a public authority is not required to comply with a request for environmental information if the information is already publicly available and easily accessible) did not apply to all of the information withheld. However, given that the Commissioner was satisfied that all of the information falling within the scope of the request has now been provided to the applicants, he did not require the Council to take any action.

Relevant statutory provisions and other sources

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 5(1) and (2)(b) (Duty to make available environmental information on request) and 6(1)(b) (Form and format of information)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 26 July 2010, Ms Neil (on behalf of all the applicants – all subsequent references to Ms Neil in this decision should be read as relating to her acting in that capacity) wrote to the Council in the following terms:

We wish to apply under the Freedom of Information Act for information pertaining to the planning application 09/02580 / FULL ERECTION OF ECOLOGY CENTRE (CLASS 11) AND ASSOCIATED WORKSHOP. Specifically we request the following:-



- a) *all communication (taken to mean letters, emails, notes of verbal meetings, phone calls etc, and any other form of document exchanged between parties or forming notes of meetings etc in this and subsequent use of the word communication) between the planning department and the Ecology Centre, its agents and others with respect to the application; prior to and after submitting the application.*
 - b) *All communication within the planning department with respect to the application.*
 - c) *All communication within the Council with respect to this application.*
 - d) *The report and any supporting documentation submitted to the committee that decided on the application.*
 - e) *The relevant minutes of the committee making the decision.*
2. The Council responded on 16 August 2010, informing Ms Neil that all documents relating to the application were available online and providing a link to the Council's website.
 3. On 19 August 2010, Ms Neil wrote to the Council requesting a review of the way it had dealt with the request. Ms Neil stated that she was already aware what was available on the Council's planning website and that the request had been framed accordingly.
 4. The Council notified Ms Neil of the outcome of its review on 20 September 2010. It concluded that the initial response did not properly address all aspects of the request and informed Ms Neil that as the request was for "environmental information" as defined in the EIRs, it was therefore relying upon section 39(2) of FOISA and considering the request under the terms of the EIRs. The Council provided Ms Neil with certain information and explained that all other information falling within the scope of her request was easily available to her on the Council's website and therefore subject to regulation 6(1)(b) of the EIRs. It provided two weblinks, one in relation to parts a) to c) of the request and one in relation to parts d) and e).
 5. On 4 October 2010, Ms Neil wrote to the Commissioner, stating that she was dissatisfied with the outcome of the Council's review and applying 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 certain specified modifications.
 6. The application was validated by establishing that Ms Neil had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.



Investigation

7. On 13 October 2010, the investigating officer notified the Council in writing that an application had been received from Ms Neil, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on any provisions of the EIRs it considered applicable to the information requested.
8. In response, the Council advised of the searches carried out at review stage and also confirmed (with details) that it had carried out further searches on being notified of the application. These had identified one further email, which was not available online. The Council apologised for this omission and provided a copy of this email to Ms Neil during the investigation.
9. Ms Neil raised questions as to what information should be published on the Council's website and when, but these are not matters for the Commissioner. The key questions for him in this case are what information the Council held which fell within the scope of Ms Neil's request, and the extent to which the Council was correct to argue that this information was publicly available and easily accessible to the applicant online.
10. Ms Neil also referred to the suspected existence of emails to and from councillors on the application in question. While the Commissioner has taken this into consideration in his investigation, he would point out that such communications would require to be held by the Council (rather than the councillors themselves) before they could be caught by Ms Neil's request.
11. The relevant submissions obtained from Ms Neil and the Council will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the information available online and the submissions made to him by both Ms Neil and the Council and is satisfied that no matter of relevance has been overlooked.
13. The Council relied upon the provisions of regulation 6(1)(b) of the EIRs, which state 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.



14. In order to determine whether the Council dealt with Ms Neil's request correctly, the Commissioner must be satisfied as to whether at the time it received the request, all the information held by the Council (and which fell within the scope of the request) was both publicly available and easily accessible.
15. The Council provided submissions in response to the questions put by the investigating officer on this matter. The Council advised on the searches and enquiries which it had undertaken with relevant sections and departments in order to identify whether any information falling within the scope of Ms Neil's request was held. The Commissioner is satisfied that adequate searches were carried out during the investigation to ascertain what information was held. Given that these searches identified information not found in earlier searches, however, he cannot accept that it took adequate steps to identify the information requested in response to Ms Neil's request for information or her requirement for review: to the extent that it failed to do so, it failed to comply with regulation 5(1) of the EIRs.
16. The Council provided details of the Council's website, with a specific link to where the relevant information could be accessed. The Commissioner notes that, in her request for review, Ms Neil had indicated that she was aware what was available online. On review, the Council provided a further link to committee information falling within the scope of the request.
17. The Commissioner has considered the submissions he has received from both the Council and Ms Neil on the availability and accessibility of the information. He has also considered the online resources identified by the Council and is satisfied that any information actually available on those resources at the time the Council received Ms Neil's application was publicly available and easily accessible to the applicant. However, he has also concluded from his investigation that not all of the relevant information which was held by the Council was available online when the request was received by the Council (although certain of the information has been published there subsequently). To the extent that the information was not so available, the Commissioner can only conclude that the Council was not entitled to rely upon regulation 6(1)(b) in responding to Ms Neil's request and consequently it failed to comply with regulation 5(1) of the EIRs.
18. Given that he is satisfied that the Council has now supplied Ms Neil with any information which remains unavailable online, the Commissioner does not require the Council to take any action in this case.



DECISION

The Commissioner finds that Fife Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs), and in particular with regulation 5(1), in dealing with Ms Neil's request. Specifically, he finds that the Council failed to identify all of the information it held which fell within the scope of the request, and that it was only partially justified in relying on the provisions of regulation 6(1)(b) of the EIRs in relation to the information requested (not all of that information being publicly available and easily accessible to the applicant).

In the circumstances, given that the information requested is now either available to the public and easily accessible to the applicant, or has been provided to the applicant, the Commissioner does not require the Council to take any action in respect of this failure in response to Ms Neil's application.

Appeal

Should either the applicants or Fife Council wish to appeal against this decision, there is an 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 notice.

Margaret Keyse
Head of Enforcement
31 January 2011



Appendix

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

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.
- (2) The duty under paragraph (1)-
...
(b) is subject to regulations 6 to 12.

...

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.