



Scottish Information
Commissioner

**Decision 039/2005 - Mr Hollow and the City of Edinburgh
Council**

Requests for information relating to two planning applications

Applicant: Mr Hollow

Authority: The City of Edinburgh Council

Case No: 200501224

Decision Date: 19 October 2005

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 039/2005 – Mr Hollow and the City of Edinburgh Council

Requests for information relating to two planning applications - processing under Environmental Information (Scotland) Regulations 2005 as opposed to Freedom of Information (Scotland) Act 2002

Facts

Mr Hollow requested information relating to two planning applications from the City of Edinburgh Council (the Council). The request was limited to information which was not publicly available.

Mr Hollow disputed the decision by the Council to process his requests under the Environmental Information (Scotland) Regulations 2004 as opposed to the Freedom of Information (Scotland) Act 2002.

The Council stated in its submissions to the Commissioner that all the information held in relation to the applications was publicly available.

Outcome

The Commissioner found that the Council acted correctly in considering Mr Hollow's requests under the Environmental Information (Scotland) Regulations 2004 as opposed to the Freedom of Information (Scotland) Act 2002.

The Commissioner also found that the Council holds no information which falls within the scope of Mr Hollow's original information requests.



Appeal

Should either Mr Hollow or the Council wish to appeal against my 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 of receipt of this notice.

Background

1. On 1 January 2005 Mr Hollow submitted two requests for information relating to two separate planning applications to the City of Edinburgh Council (the Council). The applications related to residential developments in the Fountainbridge area of Edinburgh, one at Leamington Wharf and the other in Leamington Terrace. In his requests, Mr Hollow requested copies of:
 - a) All minutes from the development department concerning the developments;
 - b) All internal memos from within the development department concerning the developments;
 - c) All communications with and between the development department and the developer (other than those on the planning portal website) concerning the developments;
 - d) All communications between the development department and the planning committee (other than those publicly available on the Council's website) concerning the developments;
 - e) Any other information not covered by the above but not freely available either in the archives or on the web concerning the developments.

Mr Hollow also stated in his request that he was not seeking information which is publicly available, either through the internet or from the Council's planning archives.
2. The Council responded on 20 January 2005. In this response, the Council informed Mr Hollow that the requested information is exempt under the Freedom of Information (Scotland) Act 2002 (FOISA) because it falls under the terms of the Environmental Information (Scotland) Regulations 2004 (the EIRs). The Council then informed Mr Hollow that the information he sought was available through its planning archives, and provided instruction on how these can be accessed from Council premises.



3. A request for review was received by the Council on 27 January 2005. In this correspondence, Mr Hollow stated that it was his belief that the information was not primarily environmental and that he was unable to visit the Council's premises due to his work commitments. Mr Hollow also stated that, on a previous visit to the Council, the file did not contain all the information he sought, and that it did not appear to be the Council's policy to put internal memos, minutes of meetings and all letters from developers into the file.
4. The Council's response to this request for review, dated 1 March, confirmed that all recorded information relating to the developments is held in the appropriate planning file. The Council also confirmed its belief that the information requested constituted environmental information under the terms of the EIRs. Given Mr Hollow's stated difficulty in attending the premises, the Council provided details of costs for having the requested information copied and sent to Mr Hollow, while also confirming the extended opening hours of the Planning offices.
5. Mr Hollow was dissatisfied with this response from the Council. I received an application under section 47(1) of FOISA from Mr Hollow on 26 April 2005. It should be noted that section 47(1) of FOISA covers applications made under FOISA and the EIRs.

The Investigation

6. Mr Hollow's application was validated by establishing that he had made a valid information request to a Scottish public authority and had appealed to me only after requesting that the authority review its response to his request.
7. My Office contacted the Council for their comments and further information relating to the case on 13 May. The Council responded to this correspondence on 30 June. Information requested by my Office included:
 - Examples of the information requested
 - A detailed explanation of the decision to process the request under the EIRs
 - A breakdown of the charges made under Regulation 8 of the EIRs
 - Details of the retention policy in relation to planning documentation
 - Details of any circumstances under which the information requested might not be contained in the planning application file.



The Commissioner's Analysis and Findings

8. In his application to my Office, Mr Hollow stated that there were three reasons for his dissatisfaction with the Council's response. In summary, these were as follows:
- The information is not primarily environmental
 - The information in which he is interested is not contained within the planning archive files
 - Mr Hollow has difficulty in visiting the planning archives due to his work commitments.

EIRs or FOISA?

9. Mr Hollow states that he does not consider the information to be environmental, and that access to the information should therefore have been provided under FOISA. However, while Mr Hollow explicitly referred to FOISA when he made his initial requests to the Council, this will not necessarily mean that his request should be processed under that legislation. If the information sought by an applicant falls under the definition of 'environmental information', then the information request should be processed in accordance with the EIRs, regardless of whether the applicant refers directly to them in their request.
10. 'Environmental information' is defined in Regulation 2 of the EIRs. Regulation 2 states that 'environmental information' includes information on:
- "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...and the interaction among these elements" (regulation 2(1)(a))
 - "Measures (including administrative measures) such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements..." (regulation 2(1)(c))
 - "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..." (regulation 2(1)(f))
11. Mr Hollow's initial requests sought copies of minutes, internal memos and communications relating to the two developments.



12. In its response to this Office, the Council stated that, in its view, documents and communications relating to the developments constituted 'environmental information'. The Council went on to provide specific examples of the information held, accompanied by commentary outlining why it considered the information to be 'environmental'. This included:
- A 'Policy Advice Note' relating to the Leamington Wharf development. This is a Council document which discusses the policy implications of the development, including the impact of the development on the site's status as an Urban Wildlife Site.
 - Correspondence between the Council and the architect relating to the Leamington Wharf development. This concerns the creation of a usable waterspace as part of the development, while also addressing the fact that Ancient Monument consent has been granted to carry out the operations on the waterway.
 - Internal Council communication document, whose purpose was to obtain comments from the Transportation Department on the development in Leamington Terrace. The Council stated that this was environmental information as it concerns the nature of the proposed surfaces, drainage, and street illumination relating to the development.
 - Correspondence between the Council and developer relating to the Leamington Terrace development. This letter accompanied the dispatch of amended drawings, and addresses amendments made in those drawings, including the reduction of the development's impact on neighbouring property, the replacement of trees in the area, and the provision of garden space.
13. Having considered the information held by the Council, it is my opinion that the Council was correct in its decision to process Mr Hollow's request under the EIRs as opposed to FOISA. Information relating to planning applications will commonly fall under the definition of environmental information contained in the EIRs, given that that information will, in most circumstances, explicitly relate to plans and developments which will have a direct impact on the land use and landscape of a particular area. In the case of the development at Leamington Wharf, the application would also have a significant impact on the nearby waterway.
14. I find, therefore, that the Council acted correctly in considering Mr Hollow's request under the EIRs as opposed to FOISA.



Is the requested information held by the authority?

15. Mr Hollow's initial request clearly states that he is only seeking access to that information which is not publicly available, i.e. information which is not contained either in the planning archive files or on the Council's internet site. In his application to this Office Mr Hollow stated that a previous visit to the archive revealed that the archive did not contain the information which he wanted to see, in that it did not appear to be the Council's policy to include internal memos, minutes of meetings and all letters received from developers in the publicly available files.
16. During the course of this investigation I have, however, found no evidence to support Mr Hollow's belief that the Council holds information regarding these developments which is not contained in the publicly available resources. While it is true that the relevant files do not contain copies of formal minutes, the Council has stated that this is not because these are held elsewhere and not made public, but rather that they do not exist. The Council states that it does not produce formal minutes unless the application in question relates to a major scheme where formal meetings are held with relevant parties. Minor meetings and/or discussions, such as those which took place in relation to the Fountainbridge developments, are not formally minuted. The Council states, however, that key points and actions from these meetings are generally noted in follow-up correspondence, and it provided my Office with examples of such correspondence which is available from the publicly accessible files.
17. In relation to the internal memos and communications relating to the developments, the Council provided detailed examples of these, which are again available from the planning file.
18. The Council has also made clear in its submissions that the publicly-accessible planning files are the only files held by the Council relating to developments, and that these files are therefore the only information source for Council employees as well as the public. The Council states that it is therefore essential that all relevant information is retained, given that it may well be required by planning staff in future who need to know the history of a particular site.
19. I am satisfied that all recorded information held by the Council relating to the two Fountainbridge developments is contained within the relevant planning file. While Mr Hollow has made clear his belief that additional documents and correspondence exists, I have found no evidence during the course of this investigation to support this belief.



The Council's handling of the request

20. Mr Hollow's initial request explicitly sought only that information which is not publicly available. Given that the Council holds no information r to the Fountainbridge developments which is not publicly available, the Council should have responded to Mr Hollow's request by informing him that it was being refused under regulation 10(4)(a) of the EIRs. Regulation 10(4)(a) states that Scottish public authorities may refuse to make environmental information available to the extent that it does not hold that information at the time the request is received.
21. The Council's response to Mr Hollow's initial request, however, merely directed him to that information which was available through the planning archive and the internet. By failing to explicitly state that it held no information which was not publicly available, the Council served only to fuel Mr Hollow's belief that additional information was held to which he was being denied access. While the Council acted correctly under the duty to provide advice and assistance in informing Mr Hollow of the relevant information that was publicly available, it should have done so within the context of a refusal notice (issued under regulation 13 of the EIRs) which referred to regulation 10(4)(a) . This would have ensured that Mr Hollow was made fully aware of the Council's position that no additional information was held.
22. The Council's response to Mr Hollow's request for review again did not specifically refer to regulation 10(4)(a) and, as a result, again failed to make it explicitly clear to Mr Hollow that no additional information was held.
23. The response to Mr Hollow's request for review also provided details of how Mr Hollow could access that information which is publicly available through the Council's planning archive files, including details of costs for receiving photocopies of this information. I cannot, however, consider these costs as part of this investigation. As Commissioner, I am empowered to conduct investigations only in relation to specific requests that have been made to authorities. Given that Mr Hollow's initial request was only for that information which is **not** publicly available, I cannot consider the authority's response in relation to that information which **is** publicly available within the scope of this investigation. I cannot, therefore, assess at this time whether the access to the information proposed by the Council is 'easily accessible' to the applicant, as required by regulation 6(1)(b), or whether the costs levied by the Council are 'reasonable', as required by regulation 8(3).
24. Should Mr Hollow wish to exercise his full rights under the EIRs in relation to that information which is publicly available, I would advise that he submit a new request for access to that information.
25. I would like to conclude by commenting briefly on two technical aspects concerning Council's handling of this case.



26. Firstly, the Council's initial response to Mr Hollow's request did not provide details of Mr Hollow's right to ask it to review its decision, or of his right of application to my Office, as required by regulation 13(e) of the EIRs. As such, the Council failed in its duty under regulation 13(e) in its handling of Mr Hollow's request.
27. Secondly, despite a number of reminders from my Office, the Council took almost 7 weeks to provide the information required by my Office to carry out this investigation and to respond to the invitation for comments on this case. As noted in a previous Decision Notice served on the Council (Ms Gilchrist and the City of Edinburgh Council 002/2005), it is crucial that authorities provide information to my Office in the timescales laid down by my Office. Failure to do so in future will result in my serving of a formal Information Notice on the public authority. If a public authority fails to comply with such a Notice, I can refer the matter to the Court of Session, where the failure can be treated as contempt of court.

Decision

I find that the Council acted correctly in considering Mr Hollow's requests under the Environmental Information (Scotland) Regulations 2004 (EIRs) as opposed to the Freedom of Information (Scotland) Act 2002.

I also find that the Council holds no information which falls within the scope of Mr Hollow's original information requests of 1 January 2005.

However, I find that the Council failed to comply with regulation 13(e) of the EIRs, in failing to inform Mr Hollow of his rights of appeal when responding to his initial request. I do not require the Council to take any remedial steps in relation to this failure.

Kevin Dunion
Scottish Information Commissioner
19 October 2005