

Decision Notice



Decision 049/2013 Ms Helena Wilson and the City of Edinburgh Council

Information relating to a statutory repair notice

Reference No: 201102409
Decision Date: 21 March 2013

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Scottish Information Commissioner

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Summary

On 4 October 2011, Ms Wilson asked the City of Edinburgh Council (the Council) for information regarding repairs undertaken in response to a statutory notice. The Council initially withheld some of the information and stated that it did not hold the remainder.

During the investigation, the Council disclosed the information it had initially withheld to Ms Wilson. The Council also identified and disclosed further information falling within the scope of the request. The Council withheld one document. The Commissioner found that the Council was entitled to withhold this document under the exception in regulation 10(4)(d) of the EIRs. However, in failing to identify and provide the remaining information to Ms Wilson when first responding to her request, the Council failed to comply with regulation 5(1) of the EIRs.

The Commissioner also expressed concern about the delay caused to her investigation (and to Ms Wilson) by the Council's handling of the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request) and 10(1), (2), (4)(d) and (5)(b) (Exceptions from duty to make environmental information available)

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 4 October 2011, Ms Wilson emailed the Council requesting the following information in relation to a specified property which had been subject to a statutory notice:
 - a) Dilapidation photographs of the areas worked on.
 - b) Council officers' detailed reports on the areas condemned.



- c) Details of the engineer consulted on the works.
 - d) A copy of all the notices issued and justification for those notices (reports etc.).
 - e) The frequency of site visits by the private surveyor.
 - f) Details of how Council officials controlled costs on site.
 - g) The original bill of quantities and the new higher bill of quantities (for comparison and checking of work).
 - h) A copy of all the site instructions issued for additional works.
2. On 24 October 2011, the Council emailed Ms Wilson seeking clarification on the information being sought within request (e). Ms Wilson subsequently provided the required clarification to the Council on 25 October 2011.
 3. The Council responded to Ms Wilson's request on 15 November 2011. The Council informed Ms Wilson that, in relation to requests (a), (c), (e), (f) and (h), it considered the information to be excepted from disclosure in terms of regulation 10(5)(b) of the EIRs on the basis that there was an ongoing investigation into the handling of statutory repair notices and the disclosure of the information might substantially prejudice the outcome of such investigations. In relation to requests (b) and (g), the Council informed Ms Wilson that it did not hold the requested information. In relation to request (d), the Council provided Ms Wilson with a copy of a statutory notice subject to the redaction of personal data in terms of regulation 11(1) and (2) of the EIRs.
 4. On 17 November 2011, Ms Wilson emailed the Council requesting a review of its decision, noting that the only information that had been disclosed to her had been a copy of one statutory notice. In a subsequent email to the Council, she indicated that she found it hard to believe that the Council held no information in relation to some of her requests.
 5. The Council notified Ms Wilson of the outcome of its review on 15 December 2011. The Council upheld its previous decision that the information contained in requests (a), (e), (f) and (h) was excepted from disclosure in terms of regulation 10(5)(b) of the EIRs. The Council also upheld its decision that it did not hold the information sought in requests (b) and (g). Additionally, the Council now stated that it did not hold the information sought in request (c). In relation to request (d), the Council considered that the information it had previously provided to Ms Wilson answered this request.
 6. On 21 December 2011, Ms Wilson 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.
 7. The application was validated by establishing that Ms Wilson 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.



Investigation

8. On 9 January 2012, the Council was notified in writing that an application had been received from Ms Wilson and was asked to provide the Commissioner with any information withheld from her. On 15 February 2012, the Council responded with the information requested and the case was then allocated to an investigating officer.
9. On 22 February 2012, the investigating officer wrote to the Council, 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. The Council was asked to justify its reliance on any provisions of FOISA and the EIRs it considered applicable to the information requested. Additionally, the Council was asked to explain the searches it had undertaken in order to identify and retrieve relevant information falling within the scope of Ms Wilson's request. The investigating officer asked the Council to provide its submissions by 14 March 2012.
10. The investigating officer also contacted Ms Wilson regarding the matters under consideration in the investigation. Ms Wilson confirmed that she remained dissatisfied with the Council's response to request (d) on the basis that, whilst the Council had provided her with a copy of a statutory notice, it had provided no justification for the notice (as she had requested).
11. On 14 March 2012, the Council contacted the investigating officer indicating that it had reconsidered its position and intended disclosing further information to Ms Wilson within the next week. At this stage, the Council did not provide any submissions explaining its handling of the request or whether it considered any of the information to remain excepted from disclosure, nor did the Council explain the searches that had been undertaken in order to retrieve and locate the requested information.
12. Despite ongoing correspondence and reminders from the investigating officer, the Council did not in fact disclose any further information to Ms Wilson until 6 June 2012, some three months after it had informed the investigating officer of its intention to do so imminently. At this stage, the Council informed Ms Wilson that it considered all of the information that it held relating to her request had now being disclosed. The Council provided Ms Wilson with information that it considered fell within the scope of requests (a), (b), (d), (g) (in relation to the original bill of quantities) and (h). The Council informed Ms Wilson that it did not hold any information falling within the scope of requests (c), (e), (f) and (g) (in relation to the final bill of quantities).
13. On 2 August 2012, the investigating officer contacted the Council again, asking additional questions concerning its latest response to Ms Wilson and seeking further information regarding the searches that had been undertaken in order to locate and retrieve information.



14. The Council responded on 14 September 2012, indicating that it had retrieved some additional information falling within the scope of Ms Wilson's request, including site photographs, site inspection reports and a structural assessment report. The Council also provided responses to the questions posed most recently by the investigating officer. At this stage, despite having stated that it had now retrieved additional information falling within the scope of the request, the Council gave no indication of when or whether it intended disclosing this information to Ms Wilson.
15. The investigating officer subsequently contacted the Council again, asking it to clarify its intentions regarding the new information that had been identified; i.e. whether it intended disclosing the information to Ms Wilson or whether it considered the information to be excepted from disclosure in terms of the EIRs.
16. At this stage, the investigating officer also informed the Council that the information that had been disclosed to Ms Wilson on 6 June 2012 appeared to be incomplete and had failed to include some of the information that the Council previously supplied to the Commissioner (the withheld information) on 15 February 2012.
17. On 19 October 2012, the Council disclosed to Ms Wilson the additional information that it had retrieved and to which it had referred in its communication to the investigating officer on 14 September 2012.
18. On 22 November 2012, the investigating officer contacted the Council, asking additional questions concerning the information disclosed to Ms Wilson on 19 October 2012. The investigating officer noted that the information disclosed on 19 October 2012 appeared to suggest that further information should be held by the Council. The investigating officer also asked whether any additional searches could be conducted by the Council in order to locate and retrieve any relevant information.
19. On 27 November 2012, the Council disclosed further information to Ms Wilson; this was the information that had previously been provided to the Commissioner, but which had not subsequently been provided to Ms Wilson by the Council on 6 June 2012.
20. On 14 December 2012, the investigating officer contacted the Council again, posing additional questions that had arisen as a result of the information disclosed to Ms Wilson on 27 November 2012. The investigating officer reminded the Council that it had not answered the questions that he had posed on 22 November 2012. Additionally, the investigating officer required the Council to conduct further searches in order to locate and retrieve information falling within the scope of Ms Wilson's request.
21. On 30 January 2013, the Council contacted the investigating officer explaining that it had conducted further searches and had again identified additional information falling within the scope of Ms Wilson's request comprising a further eleven documents. The Council gave no indication as to when or whether this latest information was to be disclosed to Ms Wilson.



22. The investigating officer contacted the Council on 31 January 2013, asking when it would disclose the newly discovered information to Ms Wilson. After a further prompt from the investigating officer, the Council indicated, on 12 February 2013, that it intended disclosing the majority of the newly discovered information to Ms Wilson. The Council stated that it was withholding one document (a draft account) which it considered to be excepted from disclosure under the EIRs.
23. On 22 February 2013, the Council disclosed the additional information to Ms Wilson. Furthermore, the Council provided submissions to the Commissioner justifying the withholding of the draft account, arguing that the information was excepted from disclosure under regulations 10(4)(d) and 10(5)(b) of the EIRs.
24. The information disclosed to Ms Wilson by the Council had been redacted in order to withhold any personal data of third parties. During the investigation, Ms Wilson informed the investigating officer that she did not require any such personal data. The redacted personal information has therefore been discounted from consideration in what follows.

Commissioner's analysis and findings

25. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Ms Wilson and the Council and is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

26. It is clear from the Council's correspondence with Ms Wilson and the Commissioner that it considered the information requested was environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns repairs to buildings under the statutory notice regime and the Commissioner is satisfied that it falls within either paragraph (a) or paragraph (c) of the definition of environmental information contained in regulation 2(1) of the EIRs, being information on the state of the elements of the environment, or on measures and activities affecting or likely to affect the state of those elements.

Section 39(2) of FOISA – Health, safety and the environment

27. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Council was entitled to apply the exemption to the withheld information, given her conclusion that it is properly classified as environmental information.



28. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exemption and in dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.

Regulation 10(4)(d) of the EIRs

29. Regulation 10(4)(d) of the EIRs provides an exception from the duty to make environmental information available where the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data. Where a Scottish public authority refuses to make information available on this basis, it must state the time by which the information will be finished or completed (regulation 13(d)).
30. The Council argued that the withheld information comprised a draft account from its external consultants with remeasurements adjacent to specific items. The Council submitted that the document was a draft, had no status other than the preliminary workings of its consultants and had not been signed off. It stated that there was the potential for disparity between the figures within the draft and the final account when tendered. The Council explained that the final account had not been resolved and it was unable to provide a timescale for the provision of an agreed and signed off account.
31. The Commissioner accepts that this document contains information falling within the scope of Ms Wilson's request, and that it is an incomplete document and comprises material in the course of completion. For this reason, she accepts that the exception in regulation 10(4)(d) applies to this information.
32. Having reached this conclusion, the Commissioner is required to consider the public interest test required by regulation 10(1)(b) of the EIRs. The test specifies that a public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.
33. The Council argued that the balance of the public interest favoured withholding the information. The Council provided no submissions in support of its position on the public interest beyond the reasons already provided explaining why it considered the exception was engaged.
34. Ms Wilson did not provide any additional submissions regarding the Council's application of this exception or the public interest test.
35. The Commissioner has considered carefully the balancing exercise required by the public interest test. She has also had regard to the particular content and nature of the information under consideration.



36. The Commissioner recognises that there is a general public interest in transparency and allowing public scrutiny of decision making and matters that have attracted considerable publicity. She accepts that there is a real and substantial public interest in understanding how projects such as the repairs carried out under statutory notice have been managed.
37. The Commissioner also recognises that this must be balanced against any detriment to the public interest as a consequence of disclosure. In the context of this case, the Commissioner considers that there is a strong public interest in allowing draft or incomplete documents to be finalised before they are subject to public scrutiny. It is the Commissioner's view that the disclosure of this particular information may harm discussions surrounding progress towards a final agreed and signed off account, and its disclosure would therefore be detrimental to the public interest. In this case, the Commissioner considers, on balance, that the public interest favours maintaining the exception.
38. The Commissioner therefore concludes that the Council complied with the EIRs by withholding under regulation 10(4)(d) the information contained in the draft account.
39. Since the Commissioner is satisfied that the Council was entitled to withhold the draft account under regulation 10(4)(d), she will not go on (and is not required) to consider whether this particular information is also excepted from disclosure under regulation 10(5)(b). She will, however, consider regulation 10(5)(b) in relation to the information that was initially withheld under this exception.

Regulation 10(5)(b) of the EIRs

40. Regulation 10(5)(b) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature.
41. As noted above, the Council initially informed Ms Wilson that it was withholding a large volume of the information being sought on the basis that it was excepted from disclosure under regulation 10(5)(b) of the EIRs. In its response to her request (upheld in its review outcome), the Council informed Ms Wilson that it was withholding some of the requested information under this exception because there was an ongoing investigation into the handling of statutory repair notices. In the circumstances, it believed that the release of the information might prejudice substantially the outcome of such investigations, especially if criminal prosecutions were to arise. The Council considered that the public interest was better served by ensuring that the investigation was not prejudiced by releasing potential evidence into the public domain.



42. During the investigation, the information initially withheld under this exception was disclosed to Ms Wilson. At no stage during the investigation did the Council explain to the Commissioner why it considered that the information it had previously been withholding under regulation 10(5)(b) of the EIRs was no longer covered by that exception: i.e. whether a change in circumstances meant that the exception no longer applied; whether a change in circumstances had tipped the balance of public interest towards disclosure; or whether the Council had decided that the exception had been wrongly applied in the first place. In the circumstances, the Commissioner can only conclude that (in this particular case) the Council was not entitled to withhold the information under regulation 10(5)(b) and in doing so failed to comply with regulation 5(1) of FOISA.

Has all relevant information been identified and retrieved by the Council?

43. As noted above, on 6 June 2012, the Council informed Ms Wilson that all information that it held relating to her request had been disclosed to her. Clearly, this was inaccurate, given that additional information was subsequently located and disclosed to her on more than one occasion.
44. The Council has provided the Commissioner with evidence that it undertook searches in response to the initial request and request for review, but, given the number of documents that were later retrieved, it is clear that these searches were not sufficiently thorough to locate all of the information requested by Ms Wilson. The Commissioner understands that, at the time Ms Wilson's request was received, the Council had received a high volume of information requests relating to statutory notices. Nevertheless, the Commissioner would expect the Council to ensure that any searches undertaken to identify information relevant to an information request were sufficiently thorough, in order to ensure compliance with regulation 5(1) of the EIRs.
45. The Commissioner is satisfied that the Council has now conducted proportionate searches and has identified and disclosed all relevant information to Ms Wilson. However, the Commissioner is concerned that only part of this information was identified at the initial point of disclosure and that it took additional prompting before the Council managed to locate and disclose a considerable volume of relevant information. In failing to identify and provide this information at the time of Ms Wilson's request, the Commissioner finds that the Council failed to comply with regulation 5(1) of the EIRs.

The Council's handling of the request

46. Having reached her formal conclusions above, the Commissioner wishes to highlight her serious concerns about the Council's handling of Ms Wilson's information request, and its conduct during the investigation of this case.



47. While Ms Wilson had obtained a considerable volume of information that she wished to access by the end of the investigation, the Commissioner is disquieted by the fact that this was not achieved until 16 months after she first made her request. As noted above, the Commissioner is aware that the Council has received a high volume of information requests relating to statutory notices. However, she considers it unacceptable that the Council's attempts to locate and retrieve relevant information should have been subject to such significant delays.
48. The Council's failure to conduct adequate searches continued well into the investigation and it was not until 22 February 2013 that the Council disclosed the final tranche of information to Ms Wilson. Bearing in mind that the Council had informed the investigating officer on 14 March 2012 that all relevant information was to be disclosed "within a week", the Commissioner considers this unacceptable.
49. As a result of the Council's inadequate handling of the request, Ms Wilson has received an extremely poor service from the Council and suffered significant inconvenience as a result of the delay in obtaining information. Furthermore, the Commissioner considers a disproportionate amount of her staff's time has been expended in order to resolve this matter.
50. The Commissioner does not require any action to be taken in relation to the breaches identified in response to this decision. However, she is extremely concerned to note the conduct of the Council in relation to Ms Wilson's request; in particular the delays in providing information and the clearly inadequate searches that were undertaken at the outset and throughout the investigation.

DECISION

The Commissioner finds that the City of Edinburgh Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Ms Wilson.

The Commissioner finds that the Council was entitled to withhold the draft account under regulation 10(4)(d) of the EIRs.

The Commissioner finds that the Council was not entitled to withhold the majority of the information requested by Ms Wilson on the basis of the exception in regulation 10(5)(b) of the EIRs. By failing to provide Ms Wilson with that information, the Council breached regulation 5(1). In failing initially to identify all of the information falling within the scope of Ms Wilson's request, the Council also breached regulation 5(1).

Given that, during the investigation, the Council disclosed the information it had initially claimed to be excepted, and took steps to identify and provide all relevant information covered by Ms Wilson's request, the Commissioner does not require it to take any further action.

Decision 049/2013
Helena Wilson
and the City of Edinburgh Council



Appeal

Should either Ms Wilson or the City of Edinburgh 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
21 March 2013



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.

...



The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

-

(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;

...

(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;

...

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.

...



10 Exceptions from duty to make environmental information available–

- (1) A Scottish public authority may refuse a request to make environmental information available if-
 - (a) there is an exception to disclosure under paragraphs (4) or (5); and
 - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
 - (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that

...

- (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or

...

- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

...

- (b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;

...