

Decision Notice 075/2020

Notes of meeting and contamination reports

Applicant: The Applicant

Public authority: North Lanarkshire Council

Case Ref: 201901881



Scottish Information
Commissioner

Summary

The Council was asked for meeting notes/minute about a proposal to build a new primary school and associated contamination reports. The Council supplied notes taken by officials at the public consultation meeting and stated that it did not hold any contamination reports.

The Commissioner investigated and found that the Council had correctly identified all the information it held, but that it should have responded to part of the request under the EIRs rather than under FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (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), (b), (c) and (f) of definition of “environmental information”); 5(1) (Duty to make environmental information available on request); 6(1)(b) (Form and format of information); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available)

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 13 July 2019, the Applicant made a request for information to North Lanarkshire Council (the Council). The information requested was:
 - copies of reports, tests and inspections carried out by the Council or anyone acting on the Council’s behalf on the land at Lanrig Park, Muirhead or properties within one mile of that location in respect of contamination from chemicals and methane gas [Part 1];
 - copies of minutes and notes taken by all the officials who attended the public consultation meeting on the proposal to build a new Chryston primary school which was held in Chryston High School on Tuesday 2nd October 2019 at 7pm [Part 2];
 - names of all North Lanarkshire councillors and their respective political parties who voted in favour of the proposal to build a new Chryston primary school on the current site of Lanrig Park, Muirhead [Part 3]; and
 - information on how to complain about dishonesty by Councillors or officials acting on behalf of the Council [Part 4].
2. The Council responded on 12 August 2019. For Part 1, it relied on section 17 of FOISA and stated that no information was held. The Council also explained that investigations at the site for the proposed new school will be undertaken “in the near future”. For Part 2, the Council supplied notes taken by officials, with some personal data redacted in terms of section 38(1)(b) of FOISA (Personal information). For Part 3, the Council gave a link to its website that it said would show the councillors present at the meeting. For Part 4 of the request, the

Council provided a link to the Standards Commission for Scotland, and explained that complaints about Council employees should be addressed to the Council's Chief Executive.

3. On 17 August 2019, the Applicant wrote to the Council requesting a review of its decision on the basis that he believed more information was held by the Council. In relation to Part 1 of his request, he highlighted that he had asked for any test carried on site *and* within a one mile radius. He also believed that the Council must have more information, such as minutes of the meeting, for Part 2 of his request. In relation to Part 3 of his request, the Applicant stated that he wanted a list of councillors who had attended the Council Committee meeting and how they had voted.
4. The Council notified the Applicant of the outcome of its review on 13 September 2019. The Council repeated that no information was held for Part 1 of the request, but explained that reports and planning applications for the area specified were available on the Council's online planning system¹, which would include access to Site Investigation reports. The Council advised that the Applicant could carry out searches based on map-based search². For Parts 2 and 3 of the request, the Council confirmed that it held no more information. The Council listed the elected members present at the full Council meeting on the 20 June 2019, and advised that the Applicant could get information about elected members and their respective political parties from the Council's website³.
5. On 12 October 2019, the Applicant wrote to the Commissioner. The Applicant 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. The Applicant was dissatisfied with the outcome of the Council's review as he believed more information was held that fell within Parts 1 and 2 of his request. The Applicant did not query the redaction of personal data from the information the Council provided.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. 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 to answer specific questions. These related to how the Council had identified any information held by it that fell within the Applicant's request.

Commissioner's analysis and findings

8. In coming to a decision on this matter, the Commissioner considered all the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

¹<https://eplanning.northlanarkshire.gov.uk/online-applications/search.do?action=simple&searchType=Application>

² <https://eplanning.northlanarkshire.gov.uk/online-applications/spatialDisplay.do?action=display&searchType=Application>

³ <https://mars.northlanarkshire.gov.uk/egenda/public/main.pl?op=ListCurrentMembers>

FOISA or the EIRs

9. "Environmental information" is defined in regulation 2(1) of the EIRs (paragraphs (a), (b), (c) and (f) of the definition are reproduced in full in the Appendix to this decision). Where information falls within the scope of this definition, a person has a right to access the information under the EIRs, subject to qualifications and exceptions in the EIRs.
10. The Council acknowledged that the information requested in Parts 1 and 2 of the Applicant's request fell within this definition, and therefore the Council should have been responded to those parts of the request in terms of the EIRs.
11. Part 1 was for any report, test and inspections on a specified piece of land (or properties) in respect of contamination from chemicals and methane gas. Such information is about the state of the elements of the environment listed in paragraph (a), for example air and atmosphere, water, soil, and land. The information could also include factors such as substances, waste, emissions or discharges that would affect elements of the environment, such as referred to in paragraph (a) of the definition (i.e. water, soil, and land). The information could also fall within paragraph (f) too, as recorded information about human health and safety, including 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).
12. Part 2 of the request sought minutes and notes taken by all the officials who attended the public consultation meeting on the proposal to build the primary school. This information would fall within the definition in paragraph (c) as information on measures and activities affecting or likely to affect the state of the elements of the environment referred to in paragraph (a).
13. The Commissioner is satisfied that the information captured by this request would clearly fall within this definition and finds, therefore, that the Council failed to comply fully with the EIRs by failing to respond to Parts 1 and 2 of the request under the EIRs. The Council accepted this position during the investigation, but submitted that no additional information would have been located or disclosed had the request been processed under the EIRs instead of FOISA.
14. Section 39(2) provides, in effect, that environmental information is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. The exemption in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to the Applicant in this case, the Commissioner has concluded that the public interest in maintaining this exemption, and dealing with the request in line with the EIRs, outweighs the public interest in disclosure under FOISA. Therefore, the Commissioner will consider the information in what follows solely in terms of the EIRs.

Meeting notes/minutes

15. Under the EIRs, regulation 5(1) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. This obligation relates to the information held by an authority when it receives a request. The Applicant believed that the Council held more information than it had identified and disclosed to him for Part 2 of his request (copies of minutes and notes taken at the meeting).
16. The Council explained to the Commissioner that the terms of the request were communicated to the Council staff who had attended the meeting in question. The staff identified and provided a note of the meeting, and a redacted version of this note (with

personal data removed) was sent to the Applicant. The Council staff confirmed that handwritten notes taken at the meeting were used to compile the final note, and that these handwritten notes were destroyed once the final note was completed.

17. The Applicant commented that there were approximately 180 members of the public at the public consultation meeting. He therefore expected that there would have to be detailed minutes recorded and kept as part of that process and indicated that there were at least two Council employees there taking notes for that purpose. The Council was asked if there was any requirement to minute such a meeting.
18. The Council replied that there was no requirement, and the purpose of the note taken at a statutory education consultation public meeting was to note the main points raised, so that they could be documented and responded to in the final consultation report. The note was not a verbatim transcript of everything said at the public meeting, but instead was only a method of capturing relevant points made so that they could be included within the report.
19. The Commissioner must decide whether the Council complied with regulation 5(1) in locating all relevant information falling within the Applicant's request. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
20. Having considered all the relevant submissions, the Commissioner accepts that the Council has taken adequate and proportionate steps to establish the information it held which fell within the scope of the Applicant's request. In reaching this conclusion, the Commissioner has taken into account the following:
 - the Council officials involved in searching for the information had experience and knowledge of the subject matter of the request and there was less likelihood of error and misunderstanding in locating the information requested. The Commissioner notes that the Council asked those involved in the meeting to check what information was held.
 - the Council has no duty to minute such meetings in the detailed fashion suggested by the Applicant
 - the Council identified information initially and at review, indicating that its searches were capable of locating the appropriate information, and it is likely that similar information would also have been identifiable by such searches as being similarly filed, stored or categorised
 - it would be good records management practice to destroy handwritten notes that were incorporated into a more formal note.
21. The Commissioner is satisfied, on the balance of probabilities, that the Applicant has received all the information held by the Council (except the personal data) that falls within the scope of the request. He therefore finds that the Council complied with regulation 5(1) of the EIRs in responding to Part 2 of the Applicant's request.

Contamination reports

22. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when

the applicant's request is received. As above, the standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities.

23. In its submissions to the Commissioner, the Council confirmed that it had initially interpreted the request as seeking information only for tests or inspections that the Council instigated, either for its own buildings or proposed buildings or if it was concerned about another's property/land. The Council confirmed that its initial interpretation was that the request did not seek information that related to reports carried out by any other proprietors.
24. The Council explained to the Commissioner that it has duties and responsibilities relative to contaminated land and carries out inspections prioritised in line with its contaminated land strategy. (It also referred to regulators that have a regulatory function in respect of contamination.) However, for the area specified in the Applicant's request, the Council had not carried out any inspections, tests or reports nor had any been ordered on the Council's behalf. The division of the Council that dealt with contaminated land - and would carry out any inspections - confirmed that none had been carried out and therefore no information was held.
25. In his request for review, the Applicant had referred to various building work that had been carried out in the area and queried why contamination tests would not be carried out for new building work. The Applicant explained that he had spent a considerable time searching the Council's planning portal for information and reports on any tests by either the Council or private builders within a one mile radius of the proposed new site of the new primary school. The Applicant said that, under planning regulations, any site where there is suspicion or evidence of ground or underground contamination, for example mine gases such as methane, should have an inspection or report. The Applicant expected that there would have been extensive inspection and reports from previous building work in the surrounding area. However, he could not find reports on the Council's portal. The Applicant also commented that he wished the Council to elaborate on its submission by confirming that it had allowed local authority and private houses and a high school to be built without carrying out any tests on that land for either methane gas or land contamination.
26. The Council acknowledged that the Applicant was correct in that, typically, applications for new build development would carry the requirement for site investigations. Site investigation reports are publicly available from the Council's online planning portal and the Applicant was referred to this in the Council's review response. However, it is the responsibility of the planning applicant to provide site investigation reports, not the Council, and the Council still believed that the review response was correct: the information sought is not held.
27. During the investigation, the Council referred to regulation 6(1)(b) of the EIRs. Regulation 6(1)(b) of the EIRs states that, where an applicant requests that information is made available in a particular form or format, a Scottish public authority shall comply with that request unless the information is already publicly available and easily accessible to the applicant in another form or format. The Council's review provided a link to both the Council's online planning portal and a map based search link, both of which included guidelines on how to use them. Due to the size of the search area requested by the Applicant, which included a one mile radius, the Council said that it did not know exactly where on the portal to look and would use the search facility of the portal. Accordingly, relevant information/reports – if held – could be accessed by using the search facility of the online portal, which the Applicant could do himself.

28. The Council explained that its portal does not permit a search for contamination reports themselves: rather, a person must identify a relevant property/planning application on the portal and then view the associated documents to see if they had information on contamination. The Council highlighted that there was a description field for all planning documents on the portal. From this field, a person could “easily discern what documents would be relevant to contamination”: an example would be an associated document described as “site investigation report”, “ground contamination risk assessment” etc.
29. In this sense, the Council is correct to advise the Applicant of information that is available on its planning portal. It is likely that information falling within the Applicant’s request – for inspections etc., instigated by the Council itself – would be available there too, were there any.
30. The Commissioner is satisfied that the Council was correct to refer the Applicant to its planning portal as a source of relevant information (if held) would be publicly available, albeit that the Applicant was already aware of that facility.
31. Having considered all the relevant submissions by both parties and the terms of the request, the Commissioner is satisfied that the Council properly interpreted this part of the request: an ordinary reading of the request would be for reports that the Council instigated in some way. The Commissioner accepts that the Council took adequate, proportionate steps in the circumstances to establish whether it held any information that fell within the scope of the request. In conclusion, the Commissioner is satisfied, on the balance of probabilities, that the Council does not (and did not, on receiving the request), hold any further information falling within the scope of the request.
32. The exception in regulation 10(4)(a) of the EIRs is subject to the public interest test in regulation 10(1)(b) and so can only apply if, in all the circumstances of the case, the public interest in maintaining the exception outweighs that in making the information available. In this case, for the reasons set out above, the Commissioner is satisfied that the Council does not (and did not, on receiving the request) hold any information covered by the request. Consequently, he accepts that there is no conceivable public interest in requiring the disclosure of such information and finds that the public interest in making information available is outweighed by that in maintaining the exception.

Decision

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

The Commissioner finds that the Council correctly identified the information falling within Parts 1 and 2 of this request, but failed to comply with regulation 5(1) of the EIRs in processing these parts of the request under the Freedom of Information (Scotland) Act 2002 (FOISA).

The Commissioner does not require the Council to take any action in respect of this failure in response to the Applicant’s application.

Appeal

Should either the Applicant 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

19 May 2020

Appendix 1: 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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (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;

(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.

...

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.

...

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

- (a) it does not hold that information when an applicant's request is received;

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info