

Decision Notice 081/2021

Consultation submissions

Applicant: The Applicant

Public authority: East Dunbartonshire Council

Case Ref: 202001245



Scottish Information
Commissioner

Summary

The Council was asked for the submissions it has received in relation to a specific consultation. The Council disclosed the information.

The Commissioner was asked to investigate whether the Council had provided all of the information that it held falling within the scope of the request. Following an investigation, the Commissioner was satisfied that it had. However, he found that, by failing to make a legible copy of one document available, the Council had failed to comply with the EIRs.

The Commissioner has set out his observations about the Council's handling of the request.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information") (Interpretation); 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 12 December 2019, the Applicant made a request for information to East Dunbartonshire Council (the Council). The Applicant referred to the "East Dunbartonshire Council Main Issues Report Consultation 15 October – 10 December 2019" and requested all responses received in respect of the area identified in the MIR consultation 2019 and supporting documents as Kirkintilloch, Lenzie and Waterside. He stated that he would like the information to be provided electronically.
2. The Council responded on 20 December 2019. The Council advised the consultation had finished on 10 December 2019 and that it would be analysing the responses received and producing a Report of Consultation in 2020. It explained that the work was not yet complete or approved for publication and that the Report of Consultation would be published in 2020, following scrutiny and approval by Councillors. The Council offered to phone or meet with the Applicant to discuss his concerns.
3. On 20 December 2019, the Applicant wrote to the Council, requesting a review of its decision on the basis that he had not sought a copy of the report referred to, but the information provided to the Council as a result of the consultation by members of the public and other bodies. He declined the offer to discuss matters.
4. The Council notified the Applicant of the outcome of its review on 23 January 2020. The Council confirmed that the information he sought could now be disclosed. It explained that, due to the size of the electronic file, it would be sent by separate email. It further asked the Applicant to contact the Council if he did not receive the information that day.
5. On 24 January 2020, the Applicant wrote to the Council and advised that the information had not been received. There followed further correspondence and, while the Applicant had stated that provision of the information on a memory stick would be the most suitable format, on 31 January 2020 and 1 February 2020 he received a paper copy of the information.

6. On 2 February 2020, the Applicant wrote to the Council, stating there were discrepancies in the information provided. The Applicant listed eight points. In summary, the Applicant advised that the spreadsheet provided as document 1 was illegible and he questioned whether he had been provided with all of the information falling within the scope of the request.
7. The Council did not respond to the Applicant's email of 2 February 2020, despite him sending reminders on 20 March, 7 September and 3 October 2020.
8. On 20 October 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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 stated he was dissatisfied with the outcome of the Council's review because he had not been provided with the information he was to be provided with following the review. The Applicant provided a copy of the eight points of dissatisfaction he had sent to the Council on 2 February 2020, which formed the basis of his application and dissatisfaction with the review outcome.
9. While the Applicant did not make his application to the Commissioner within the six months stipulated by section 47(4)(a) of FOISA, under section 47(5) of FOISA the Commissioner considered it appropriate to accept a late application to consider whether the Council had provided the Applicant with the information it held falling within the scope of the request.

Investigation

10. 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.
11. On 11 November 2020, the Council was notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.
12. 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.
13. In particular, the Council was asked if it had considered whether the Applicant's information request should have been handled as a request for environmental information, to be responded to under the EIRs. It was also asked to confirm the searches and enquiries it had undertaken to establish what information it held falling within the scope of the Applicant's request, and to respond to the specific points the Applicant raised in his email of 2 February 2020, as mentioned above.
14. The Council responded and agreed that the information requested was environmental information and, therefore, that the request fell to be considered under the EIRs. The Council submitted that it had disclosed all of the information that it held to the Applicant, but accepted that the printed version of document 1 was illegible.
15. The Council wrote to the Applicant on 24 March 2021 and provided him with a further legible copy of document 1. It also provided explanations in relation to the other points the Applicant had raised in his email of 2 February 2020, advising that all information had been provided. It

advised that a summary of all responses had been included in the spreadsheet provided as document 1.

16. The Applicant acknowledged receipt of the further disclosure and, while this addressed some of his dissatisfaction, he maintained that he had not been provided with all of the information held by the Council. He commented that he had not asked for a “summary” but the actual submissions provided to the Council. The Applicant also expressed concern that the information had not been provided on a pen-drive but, as this had not formed part of his original application, it was not considered further.

Commissioner’s analysis and findings

17. In coming to a decision on this matter, the Commissioner considered all of 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.

Application of the EIRs

18. It is clear that any information falling within the scope of the Applicant’s request, which relates to part of the local development plan process (a measure having a clear impact on the elements of the environment), is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs (the relevant provisions are reproduced in Appendix 1 to this decision). The Applicant made no comment on the Council’s application of the EIRs in this case and the Commissioner will consider the requests in what follows solely in terms of the EIRs.

Information held by the Council

19. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. While this duty is subject to certain qualifications, none of them appear to be relevant in this case. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold (but which is not in fact held at that time).
20. The Commissioner notes the submissions provided by the Applicant as to why he considers the Council should hold further information, and his belief that the Council did not provide all of the information it held.
21. In this case, the Council submitted that all of the information it held, falling within the scope of the Applicant’s request, had been considered at the time it responded to the request and the information located had been provided to the Applicant. It commented that the information had been initially sent electronically by email but, due to it not being received by the Applicant, it had provided the information in hard copy.
22. As mentioned above, the Council accepted that the paper copy of document 1 initially provided to the Applicant was illegible. This was, however, rectified during the investigation.
23. The Council explained (with details and evidence of the outcomes) the searches and enquiries it had carried out in identifying and locating the information requested. These included searches of relevant electronic records, and consultation with staff who had responsibility for the subject matter. The conclusion of the searches and enquiries was that, other than the information provided to the Applicant, no information was held.

24. The Council also explained that the spreadsheet at document 1, as provided to the Applicant, was all that was held by the Council in respect of the relevant public submissions. It explained that the spreadsheet was automatically populated with the submissions received and that no further information was held. It acknowledged that the use of the word “summary” had caused some confusion.
25. 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.
26. Having considered all relevant submissions and the terms of the requests, the Commissioner accepts that the Council interpreted the Applicant’s request reasonably and took adequate, proportionate steps to establish what information it held which fell within the scope of the request. He accepts that (by the end of the investigation, bearing in mind the legibility issue) the Applicant was provided with all of the information held by the Council and falling within the scope of the request. However, in the absence of a legible copy of document 1, the Council could not be said to have addressed the request fully and, to this extent, the Council cannot be said to have complied fully with regulation 5(1) of the EIRs in dealing with the Applicant’s request and requirement for review.

Observations about the handling of the request

27. The following observations are not part of the Commissioner’s findings on compliance with the EIRs, but cover practice issues the Commissioner has identified during this investigation and about which he has concerns. He hopes these comments are helpful to all Scottish public authorities and requesters.
28. The Commissioner has some concerns regarding the Council’s handling of the request submitted by the Applicant. It is apparent that the Applicant submitted a valid request for information and, as such, the Council had a duty to respond in terms of both FOISA and the EIRs. As required by the legislation, the Council has a duty to advise what information it holds and, if not disclosed, why it is considered to be exempt under FOISA or excepted under the EIRs.
29. In this particular case, considering the content and context of the request, it could only be interpreted as a request for the information provided to the Council as a result of the consultation, by members of the public and other bodies. In this case, the Commissioner notes that, in its initial response to the Applicant, the Council merely advised that it intended to produce a report for the consideration of Councillors, before it was published (i.e. a report on the public submissions rather than the submissions themselves).
30. It is apparent that the Applicant was not seeking the report, which had still to be created, and the Council had a duty to issue a response detailing what information it held falling within the scope of the request, and either providing the information, or explaining why it was considered exempt or excepted from disclosure. This should have been a straightforward matter.
31. In its initial response of 20 December 2019, the Council did not confirm what information it held falling within the scope of the request or provide any explanation as to why it was considered exempt or excepted from disclosure. Failure to do so was not only bad practice on the part of the Council, but also a failure to comply with the relevant legislation.

32. The Commissioner is further concerned that, having been asked for clarification on the content of the review outcome on 2 February 2020, the Council did not respond despite repeated reminders. Whilst the Council had already conducted a review and, as such, was not required to conduct a further review in order to respond to the Applicant's email, at the very least, the Commissioner would expect the Council to remind the Applicant at the earliest opportunity that his next step was to make an application to the Commissioner. If this had been done, it is likely that the Applicant would have applied to the Commissioner considerably sooner than he did.
33. While the Council had initially sent the information requested electronically, when this had not been received by the Applicant it had a duty to ensure that the paper copies provided were legible. The Commissioner is concerned that, having had the illegibility of the information brought to its attention on 2 February 2020, it was not until the intervention of the Commissioner that this was rectified.
34. While no useful purpose would be served by requiring the Council to take any specific action in this case, the Commissioner would urge it to take steps to ensure that it meets these obligations and requirements of good practice fully in future.

Decision

The Commissioner finds that, in respect of the matters specified in the application, East Dunbartonshire Council (the Council) partially failed to comply with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the Applicant, in failing to provide a legible copy of one of the documents falling within the scope of the request (and so failing to comply with section 5(1) of FOISA).

However, the Commissioner is satisfied that the Council carried out adequate searches for the information requested and, by the end of the investigation, had provided the Applicant with all the information it held and which fell within the scope of the request. In the circumstances, the Commissioner does not require the Council to take any action in respect of the failure identified, 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

17 May 2021

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

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(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.

...

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