

Decision Notice



Decision 087/2013 Mr Paul Bova and Highland Council

Communications regarding a specified planning site

Reference No: 201202474
Decision Date: 13 May 2013

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Rosemary Agnew
Scottish Information Commissioner

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Summary

On 10 June 2012, Mr Bova asked Highland Council (the Council) for communications concerning a proposed housing development at a specified site. The Council informed Mr Bova that it did not hold any relevant information. Mr Bova remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner accepted that the Council did not hold the requested information. The Commissioner found that the Council had breached the technical requirements of the EIRs in responding to Mr Bova's requirement for review, but did not require the Council to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) 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) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2), and (4)(a) (Exceptions from duty to make environmental information available); 13(b) and (c) (Refusal to make 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 10 June 2012, Mr Bova wrote to the Council requesting the following information concerning a proposed housing development at a specified site:
 - a) All communications, written or oral, records of meetings and briefings between all Highland Council officials and Barratt Scotland between 2 December 2008 and 1 April 2009.
 - b) All communications, written or oral, records of meetings and briefings between all Highland Council officials and Councillors concerning this site.



2. Mr Bova did not receive a response and, on 11 July 2012, he emailed the Council requesting a review in respect of its failure to respond.
3. The Council wrote to Mr Bova on 18 July 2012. The Council informed Mr Bova that it had recently provided a named individual (who was known to Mr Bova) with the information that he had requested. The Council informed Mr Bova that this information had been sent to his address in response to a separate information request from the named individual.
4. On 18 July 2012, Mr Bova wrote to the Council indicating that he did not consider the Council had complied with his request.
5. On 15 August 2012, Mr Bova again asked the Council to review its handling of his request for information. Mr Bova informed the Council that he did not consider it had disclosed the information that it held in relation to both parts of his request. Mr Bova pointed out that the information to which the Council had referred in its communication to him of 18 July 2012 did not contain the information that he had requested.
6. Following an application to the Commissioner in relation to its failure to respond to his requirements for review, the Council notified Mr Bova of the outcome of its review on 21 November 2012. The Council gave notice in terms of section 17 of FOISA that it did not hold the information that he had requested. In relation to request b), the Council informed Mr Bova that information held by Councillors was not subject to FOISA.
7. On 29 November 2012, Mr Bova wrote to the Commissioner, stating that he 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.
8. The application was validated by establishing that Mr Bova 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

9. On 14 January 2013, the investigating officer notified the Council in writing that an application had been received from Mr Bova. The Council was given the opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked to respond to specific questions. The Council was asked to provide details of the searches it had undertaken to try to locate the information requested by Mr Bova.
10. The Council responded to this letter on 6 February 2013, describing the searches that it had undertaken in order to locate and retrieve any relevant information sought by Mr Bova.



11. In further correspondence, the investigating officer asked the Council whether it considered the information requested by Mr Bova to be environmental information and, if so, whether the Council should have handled the request under the EIRs. The investigating officer also informed the Council that, in her view, it appeared to have interpreted request b) too narrowly, and asked it to conduct additional searches in order to ascertain whether it held any information falling within the scope of Mr Bova's request.
12. In response, the Council agreed that the requested information was environmental. It also stated that it had dealt with Mr Bova's request under the EIRs and confirmed that it wished to apply the exemption in section 39(2) of FOISA. The Council confirmed that it had carried out additional searches as suggested by the investigating officer, but that no relevant information had been retrieved.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to her by both Mr Bova and Highland Council. She is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

14. It is clear from the Council's correspondence with Mr Bova that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns planning permission for a housing development. The Commissioner is satisfied that it would fall within either paragraph (a) of the definition of environmental information contained in regulation 2(1) of the EIRs (as information on the state of the elements of the environment) or paragraph (c) of that definition (as information on measures affecting or likely to affect those elements).

Section 39(2) of FOISA (environmental information)

15. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1)) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. During the investigation, the Council stated that it wished to apply the exemption in section 39(2) to the information requested by Mr Bova. In this case, the Commissioner accepts that the Council was entitled to apply the exemption to the requested information, given her conclusion that it is properly classified as environmental information.
16. 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.



Is the requested information is held by the Council?

17. In his application to the Commissioner, Mr Bova expressed dissatisfaction with the Council's failure to disclose any information to him. In relation to request a), he found it almost inconceivable that the Council held no such communications. In relation to request b), he considered the Council had interpreted his request too narrowly and pointed out that he had not requested information held solely by Councillors.
18. In its submissions to the Commissioner, the Council explained the steps that it had undertaken in order to locate and retrieve any relevant information falling within the scope of Mr Bova's request.
19. The Council explained that a search had been undertaken of the individual email accounts of relevant staff including their inbox, sent items and archived items. The Council provided details of the employees whose email accounts had been searched and the search terms that had been used. The Council also explained that, in order to ensure that any relevant information was located, it had not used any date parameters in its searches. The Council confirmed that it had carried out a search of the paper files of relevant planning applications and had not found any information falling within the scope of Mr Bova's request.
20. The Council stated that the email accounts of employees who may have had some involvement in the proposed development, but who had subsequently left the Council before it received Mr Bova's request, had been deleted. Therefore, the Council was unable to obtain any relevant information from such email accounts.
21. The Council also submitted that it could not state with certainty that no written notes of any discussions had been taken. However, if any such notes had been taken, they were no longer held by the Council as they were not in any paper or electronic file.
22. The Council explained that the searches it had carried out in relation to both parts of the request were intrinsically linked. The Council stated that it had not placed a restrictive interpretation on Mr Bova's request and had carried out a very wide-ranging search which would have located and retrieved any relevant information.
23. The Commissioner has considered the searches undertaken by the Council and its explanation of why these would have been likely to retrieve any relevant information sought by Mr Bova. Having done so, the Commissioner is satisfied that the Council conducted adequate searches which would have enabled it to locate and retrieve any relevant information falling within the scope of Mr Bova's request.
24. The Commissioner therefore accepts that the Council was correct to give Mr Bova notice that it did not hold any information falling within the scope of his request.



25. The Commissioner notes that her remit in carrying out this investigation extends to the consideration of whether the Council actually holds the relevant information requested by Mr Bova. She cannot comment on whether a public authority should have recorded any, or more, information about a particular event or process. Consequently, in this instance, she cannot comment on whether the Council ought to hold any or further recorded information.

Conclusion

26. In its submissions, the Council stated that it had dealt with Mr Bova's request as seeking environmental information under the EIRs. However, in its review response of 21 November 2012, the Council gave no indication that the request was being dealt with under the EIRs and instead gave notice in terms of section 17 of FOISA that it did not hold the requested information.
27. Having concluded that the Council did not hold any recorded information falling within the scope of the request, the Commissioner finds that the only appropriate response to the request would have been to notify Mr Bova that the requested information was excepted from disclosure under regulation 10(4)(a) of the EIRs, on the basis that it did not hold the information. By failing to give appropriate notice under the EIRs, the Commissioner finds that the Council breached regulation 13(b) and (c) of the EIRs.
28. The Commissioner also considers that some of the Council's correspondence with Mr Bova was unhelpful. As noted above, the Council's correspondence with Mr Bova on 18 July 2012 suggested that the information he was seeking was contained within information it had supplied to another individual who was known to him. This turned out to be inaccurate. The Council's response to Mr Bova's requirement for review appeared to suggest that it had interpreted request b) as one seeking information held solely by Councillors. The Commissioner is satisfied that this was not the interpretation that the Council placed on the request, but would recommend that the Council be clearer in its responses to requesters in future.

DECISION

The Commissioner finds that Highland Council (the Council) does not hold recorded information falling within the scope of the request made by Mr Bova, and that it did not hold such information at the time when it received the request.

The Commissioner finds that, by failing to give notice in terms of regulation 13(b) and (c) of the EIRs that it did not hold the requested information, the Council failed to comply with the EIRs. The Commissioner does not require the Council to take any action in response to this failure.

Decision 087/2013
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and Highland Council



Appeal

Should either Mr Bova or Highland 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.

Margaret Keyse
Head of Enforcement
13 May 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.
- ...
- (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;

...

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

...

13 Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-

...

- (b) specify the reasons for the refusal including, as appropriate, any exception under regulation 10(4) or (5) or provision of regulation 11 and how the Scottish public authority has reached its decision with respect to the public interest under regulation 10(1)(b);
- (c) state the basis on which any exception relied on under regulation 10(4) or (5) or provision of regulation 11 applies if it would not otherwise be apparent

...