

Decision Notice

Decision 094/2015: Mr David Chapman and East Lothian Council

Council's Response to Report on National Planning Framework (NPF3)

Reference No: 201500095

Decision Date: 24 June 2015



Scottish Information
Commissioner

Summary

On 5 September 2014, Mr Chapman asked East Lothian Council (the Council) for information pertaining to the formulation of specific parts of the Council's formal response to a report on the National Planning Framework (NPF3).

The Council provided Mr Chapman with some information. Following a review, Mr Chapman remained dissatisfied as he believed the Council held further information, and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had not provided Mr Chapman with all the information it held. By the close of the investigation, the Commissioner was satisfied that the Council had provided Mr Chapman with all further information held. She did not require the Council to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement).

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 5 September 2014, Mr Chapman made a request for information to the Council. He referred to a meeting of the Council's Cabinet held on 11 June 2013, where the Cabinet had agreed to delegate to the Executive Director (Services for Communities), in consultation with others, the Council's formal response to the Scottish Government's Main Issues Report on Scotland's Third National Planning Framework (NPF3).
2. The information requested, relating to the generation of sections 2.1 to 2.7 inclusive of the Council's formal response, was:
 - (i) all communication, including but not limited to, letters, faxes, e-mails, notes of telephone conversation and minutes of meetings, between Councillors and officers regarding the specified sections of the document, both before and after its submissions to the Scottish Government,
 - (ii) all communication, as defined above, between officers including, but not limited to, those mentioned in the minute of Cabinet meeting quoted above, regarding the specified sections of the document, and
 - (iii) all communication, as defined above, between the Council, including Councillors and officers, and the Scottish Government, including agencies of the Scottish Government (including, but not limited to, Scottish Enterprise) regarding the specified sections of the document both before and after its submission.

3. The Council acknowledged Mr Chapman's request on 9 September 2014. It responded on 1 October 2014, providing Mr Chapman with information it considered to fall within the scope of the request.
4. On 3 October 2014, Mr Chapman wrote to the Council requesting a review of its decision. He had not been provided with all the information he expected to receive. He believed that the Council may have misinterpreted his request and provided further context in support of his view.
5. The Council acknowledged receipt of Mr Chapman's requirement for review on 4 November 2014, confirming that a further search would be carried out. In the meantime, it provided Mr Chapman with some further information it had identified.
6. On 20 November 2014, the Council provided Mr Chapman with the outcome of its review, enclosing all the information the additional searches had identified.
7. On 12 January 2015, Mr Chapman wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. He stated he was dissatisfied with the outcome of the Council's review because 70% of the information provided either fell outwith the scope of his request or duplicated such information as was relevant. He also believed that further information existed, some of which might be held in a data management system primarily controlled by another organisation.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mr Chapman made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
9. On 2 February 2015, the Council was notified in writing that Mr Chapman had made a valid application and the case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 11 February 2015, the Council was informed of the scope of Mr Chapman's application, and invited to comment and answer specific questions. In particular, the Council was also asked to provide detailed submissions as to whether it held any further information falling within the scope of Mr Chapman's request, with reference to the steps taken to establish this.
11. On 5 March 2015, the Council provided the Commissioner with its submissions on Mr Chapman's application.

Commissioner's analysis and findings

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

Background

13. The National Planning Framework (NPF)¹ sets the context for development planning in Scotland and provides a framework for the spatial development of Scotland as a whole. It sets out the Government's development priorities over the next 20-30 years and identifies national developments which support the development strategy.
14. In preparation of the third National Planning Framework (NPF3), the Scottish Government published, for consultation, the first formal stage (Main Issues Report) providing a summary of its main provisions. The consultation period on the Main Issues Report ended on 23 July 2013.
15. The Council's response² to the consultation on NPF3 was delegated to the Executive Director (Communities) and was finalised on 17 July 2013. Mr Chapman's request for information focusses on sections 2.1 to 2.7 of the Council's response, which relates to energy matters (including the future development of the Cockerzie Power Station site).

Information held

16. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received.
17. 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. She will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held. While it may be relevant as part of this exercise to explore what information should be held, ultimately the Commissioner's role is to determine what relevant information is (or was, at the time the request was received) held by the public authority.
18. In its submissions, the Council conceded that it had not carried out adequate searches in responding to the initial request or at review stage. It explained there had been difficulties with the initial search due to the retiral of a key member of staff. In the absence of this direct knowledge of the relevant records, some relevant files had not been searched. The Council confirmed this had been rectified during the investigation, with further searches being conducted.
19. In relation to the searches carried out, the Council explained it had searched within the electronic records of its Planning Service, which was the area that had prepared the response to the NPF3 consultation. This was extended, at review stage, to include searches of inboxes and correspondence of relevant Councillors, the then Head of Development and the Depute Chief Executive (Communities and Partnerships). During the investigation, the search was extended to electronic records of the Policy & Projects Department.

¹ <http://www.gov.scot/Topics/Built-Environment/planning/National-Planning-Framework>

² <http://www.gov.scot/resource/0043/00431887.pdf>

20. The Council identified the search terms it had used. It also provided copies of internal email exchanges relating to these searches.
21. The Council confirmed that no documents were stored by any other organisation.

Further information provided to Mr Chapman

22. In the searches carried out during the investigation, the Council identified two further items relevant to Mr Chapman's request. The Council wrote to Mr Chapman on 5 March 2015, providing him with this additional information and informing him that no further information was held.
23. In response to this further disclosure, Mr Chapman wrote to the Council on 9 March 2015. He remained dissatisfied that the Council had failed to explain why, in its initial response, it had provided him with additional information falling outwith the scope of his request.
24. Mr Chapman also remained unconvinced that the Council's searches for information were complete. He believed, from examination of the information he had been given, that further information existed: he provided specific examples.
25. On 27 March 2015, the Council responded to Mr Chapman, explaining why it had provided him with information falling outwith the scope of his request [this is covered in paragraph 35 below].
26. With regard to the searches it had carried out, the Council addressed the specific points raised by Mr Chapman. The Council acknowledged that further information might have existed previously but maintained that it was no longer held: the further search conducted during the investigation would have identified anything relevant. It suggested that emails might have been deleted by senders or recipients, and that unrecorded discussions might have taken place by telephone or at meetings.

Commissioner's findings

27. Having considered all of the relevant submissions, the Commissioner is satisfied that the Council had, by the end of her investigation, taken adequate and proportionate steps to establish what information it held and which fell within the scope of the request. She accepts, on balance, that any information relevant to the request was capable of being identified using the searches described by the Council.
28. The Commissioner has no locus to comment on whether more information should have been held by the Council. The question she must consider in this case is: was all the relevant information held by the Council located and considered appropriately under FOISA? She is satisfied that it was.
29. The Commissioner is concerned to note that the Council required to carry out additional searches during the investigation, after it concluded that earlier searches had failed to include all possible sources of that information. It was only after the need for these additional searches was identified during the investigation that further documents were identified, located and disclosed to Mr Chapman.

30. The Commissioner recognises and welcomes the fact that, following discovery of the additional information, the Council took steps to ensure that this was supplied to Mr Chapman promptly. She also acknowledges that the Council accepted it had not carried out adequate searches earlier.
31. It is clear that there were deficiencies in the Council's initial searches, and in those conducted at review stage. The Commissioner recommends that the Council considers what might be learned from its errors in this case, and whether steps should be taken to avoid similar occurrences in future. She notes (and welcomes) the actions referred to below, under the heading "Information falling outwith scope".
32. As the Council failed to provide Mr Chapman with information covered by his request, and which it later found and provided, the Commissioner finds that it failed to comply with section 1(1) of FOISA in responding to his request.
33. In the circumstances, given she is now satisfied that the Council has provided Mr Chapman with all relevant information held, the Commissioner does not require the Council to take any further action in this case.

Information falling outwith scope

34. In his application to the Commissioner, Mr Chapman indicated he was not satisfied that only 30% of the documents provided fell within the scope of his request, with the other 70% being either not relevant or duplicates.
35. The Council explained that at the time it received Mr Chapman's request, it had received two separate requests (from other individuals) relating to the redevelopment of Cockenzie Power Station. In responding to all three requests simultaneously, searches were not limited to "NPF3", but also extended to "Cockenzie" and "Energy Park". This resulted in additional information being provided to Mr Chapman that fell outwith the scope of his request. The Council acknowledged that this was a result of human error when conducting searches.
36. The Council submitted that it took its responsibilities in relation to Freedom of Information seriously. Under no circumstances, the Council stated, would it attempt to suppress documentation to circumvent an FOI request, or fail to keep records for the purpose of avoiding accountability. It acknowledged that this investigation had highlighted the need for refresher training for some staff, and confirmed that remedial action was also being taken forward by the Depute Chief Executive.
37. The Commissioner understands Mr Chapman's dissatisfaction in being supplied with irrelevant and duplicate information. This was unfortunate and potentially confusing. The Commissioner notes and welcomes the fact that the Council has recognised this, and is taking steps to remedy the issues identified. She would urge the Council to take care to ensure that it provides only the information the requester has asked for, in as coherent a form as possible. On the other hand, the Commissioner cannot identify the oversights identified in this paragraph (on this occasion) as failures to comply with either FOISA or recognised good practice.

Environmental information

38. Some of the information which is the subject of this application is likely to be environmental information for the purposes of the Environmental Information (Scotland) Regulations 2004 (the EIRs). This point was not raised either by Mr Chapman or by the Council. Given that the investigation focussed on whether Mr Chapman had been provided with all of the information the Council held and given that the outcome would have been the same whether the request had been dealt with under FOISA or the EIRs, the Commissioner has not considered this matter further. However, she would ask the Council to take care in future to consider the scope of the EIRs when responding to this type of request.

Decision

The Commissioner finds that East Lothian Council failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) (in particular section 1(1)) in responding to the information request made by Mr Chapman. She finds that the Council failed to identify, locate and provide all of the information it held and which fell within the scope of the request.

Given that the Commissioner is satisfied that, during the investigation, the Council provided Mr Chapman with all relevant information it held, she does not require the Council to take any action in respect of this failure, in response to Mr Chapman's application.

Appeal

Should either Mr Chapman or East Lothian 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

24 June 2015

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.

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