

Decision Notice

Decision 097/2015: ABW Consultants Limited and West Lothian Council

Planning information

Reference No: 201500849

Decision Date: 25 June 2015



Scottish Information
Commissioner

Summary

On 14 January 2015, ABW Consultants Limited (ABWCL) asked West Lothian Council (the Council) for specific information relating to a planning application. The Council provided some information, stating that other information was either publicly available or not held. The Commissioner carried out an investigation and found that the Council should have dealt with the request under the EIRs. She also found that the Council failed to identify all of the information it held and which fell within the scope of the request.

The Commissioner required the Council to provide ABWCL with a further response to its requirement for review, addressing all the relevant information it held.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) and (2) (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 14 January 2015, ABWCL made a request for information to the Council. The information requested was for information relating to a specific planning application, which can be broken down as follows:
 - i. copies of all correspondence including faxes, emails and letters in respect of the application,
 - ii. details and minutes of all meetings or briefings in respect of the application,
 - iii. details and copies of all correspondence with elected members, including complaints and responses, and including any letters of apology or explanation issued to elected members,
 - iv. copies of the relevant council rules or standing orders regarding the use of delegated authority in planning matters, particularly where such delegated decisions would alter a previous committee decision, where such delegated decision is not expressly permitted by the committee, and
 - v. details of the impacts on education capacity forecasts flowing from the amendment.

ABWCL confirmed that any information available on the Council's Planning Portal should be excluded from the request.
2. On 3 February 2015, the Council wrote to ABWCL and sought clarification as to what was meant by copies of relevant council rules or standing orders regarding use of delegated authority (part iv.). ABWCL provided clarification on 6 February 2015.

3. On 9 March 2015, ABWCL wrote to the Council requiring a review of its decision on the basis that it had failed to respond.
4. The Council notified ABWCL of the outcome of its review on 20 March 2015. The Council informed ABWCL that information pertaining to parts i. and (in part) iv. was available on its website, stated that information covered by part ii. was not held and provided some information and explanation in response to the remaining parts of the request.
5. On 7 May 2015, ABWCL wrote to the Commissioner. It applied to the Commissioner 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. ABWCL stated it was dissatisfied with the outcome of the Council's review because the Council had not complied with the terms of the request and had failed to provide all of the relevant information it held. ABWCL also submitted that since the Council had not applied any exemptions, it had not complied with the requirements of FOISA or the EIRs.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that ABWCL made a request for information to a Scottish public authority and asked the authority to review its failure to respond to that request before applying to her 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. On 2 June 2015, the investigating officer notified the Council in writing that ABWCL had made a valid application. The Council was invited to comment on this application and answer specific questions. These included whether the request should have properly been dealt with under the EIRs. It was asked to justify its reliance on any provisions of FOISA and the EIRs it considered applicable to the information requested and, in particular, to explain the steps it had taken to identify and locate the information requested.
8. The Council responded, submitting that it did not consider that an internal review had been undertaken, which may have addressed the matters now raised in ABWCL's application to the Commissioner. It acknowledged, however, that the request had not been considered as fully as it ought to have been, recognising that it specifically excluded information available on the Council's website.
9. The Council also confirmed that it had identified additional information that fell within the scope of ABWCL's request. It explained that the information now identified was being considered to ascertain whether it should be disclosed or withheld under an exemption.

Commissioner's analysis and findings

10. 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 ABWCL and the Council. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

11. It is clear 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

a planning application in relation to a substantial development and, as such, the Commissioner is satisfied that it would fall within either paragraph (a) or paragraph (c) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in Appendix 1 to this decision).

12. As the Council did not respond to the request as a request for environmental information, the Commissioner must find that it failed to respond in accordance with regulation 5(1) of the EIRs.

Was all relevant information identified, located and provided by the Council?

13. 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. This obligation relates to information that is held by an authority when it receives a request.
14. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) of the EIRs, requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies.
15. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.
16. Where an authority considers the information falls to be excepted from disclosure under regulation 10, the authority must (in compliance with regulation 13) inform the applicant under which exception the information is being withheld.
17. In this case, the Commissioner notes that (having received the request) the Council sought clarification from ABWCL and that this was provided. At that point, it should have been in a position to identify the relevant information and respond to the request.
18. Following the requirement for review of 9 March 2015, the Council responded on 20 March 2015. This response has to be considered as the Council's response to that requirement for review. There appears to be no doubt that it had received the requirement for review when it responded, and the response did all it was required to do in the circumstances (i.e. no response had been given up to that point and the email of 20 March provided that response).
19. The terms of the 20 March response are outlined at paragraph 4 above. During the investigation, the Council accepted that the request specifically excluded information that was available online (covered in the 20 March response) and further accepted that it had failed to identify and locate all of the information it held and which fell within the scope of ABWCL's request. It had located and was considering further relevant information.
20. Having considered the Council's submissions, the Commissioner is satisfied that in responding to ABWCL's request for information, the Council failed to identify and locate all of the information it held and which fell within the scope of the request. This was clearly a failure to comply with regulation 5(1) of the EIRs and is indicative of inadequate consideration of the request and subsequent searches. Had these matters been addressed

adequately in responding to the request, all relevant information should have been identified earlier, additional information might have been provided to the requester and considerable resources might have been saved by both the Council and the Commissioner.

21. The Commissioner now requires the Council to provide ABWCL with a further response to its requirement for review, which is compliant with the EIRs and addresses all relevant information it holds. The outcome of the review will be that further information is either provided to ABWCL or withheld under an exception in regulation 10 of the EIRs.

Decision

The Commissioner finds that West Lothian Council failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by ABW Consultants Limited (ABWCL).

The Commissioner finds that by failing to identify all of the information that held falling within the scope of the request, the Council failed to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires the Council to provide ABWCL with a further response to its requirement for review, addressing all relevant information it holds and either providing that information or withholding it under an exception in regulation 10 of the EIRs, by **10 August 2015**.

Appeal

Should either ABWCL 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.

Enforcement

If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

25 June 2015

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)-

(a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and

(b) is subject to regulations 6 to 12.

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