

Decision Notice



Decision 100/2012 Mr Paul Nolan and City of Edinburgh Council

Whether a request should have been dealt with under FOISA or the EIRs

Reference No: 201102253
Decision Date: 18 June 2012

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Scottish Information Commissioner

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Summary

Mr Nolan requested from the City of Edinburgh Council (the Council) information about public pathway inspections. The Council responded under the EIRs, indicating that it was charging a fee of £75.00 in advance of making the information available. Mr Nolan disputed the Council's decision to handle his request in terms of the EIRs. Following a review, he remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Council disclosed the requested information to Mr Nolan at no charge. However, Mr Nolan still wanted a decision to be issued. This decision considers only whether the Council was correct to deal with Mr Nolan's request under the EIRs.

The Commissioner found that the Council had correctly identified the information requested by Mr Nolan as being environmental information (as defined by regulation 2(1) of the EIRs) and so had appropriately dealt with his request in terms of the EIRs.

The Commissioner also found that the requested information was exempt from disclosure under section 39(2) of FOISA, and so the Council did not breach Part 1 of FOISA by refusing to disclose the information 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) (Interpretation – parts (a) and (c) of the definition of environmental information); 5(1) (Duty to make environmental information available on request)

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 11 May 2011, Mr Nolan wrote to the Council requesting the following information:



- On precisely what dates was the pathway between Hay Gardens and Hay Avenue inspected?
 - Who was it inspected by and how long did the inspection take?
 - What report was made, and who was it made to?
 - What records of the report on the inspection exist and are they available?
 - What precisely were the criteria used by the Council for clearing snow and ice from pathways and do these criteria indicate the need for a complaint to have been made?
 - Can I receive a copy of the report to the Council and the decision made on snow clearing during the bad weather at this time?
 - Has there been a review of the Council's policy and procedures?
 - Who is undertaking this review and can representation be made by members of the public?
2. The Council responded on 13 July 2011. It explained that Mr Nolan's information request was being dealt with under the EIRs and that, under regulation 8 of the EIRs, public authorities can make a charge for providing information. The Council calculated that the total cost of complying with Mr Nolan's request was £75.00, and explained how this fee was calculated. It indicated that no information would be provided until payment was received. However, it also indicated that it may be possible to provide a portion of the requested information without a charge, and it invited Mr Nolan to contact the Council if he wished to discuss that option.
 3. On 8 August 2011, Mr Nolan wrote to the Council requesting a review of its decision. He expressed dissatisfaction solely with the Council's decision to process his request under the EIRs as opposed to FOISA.
 4. The Council notified Mr Nolan of the outcome of its review on 16 August 2011. The Council advised Mr Nolan that the information he sought clearly fell under the provisions of the EIRs, and that consequently the Council was entitled to process the request under the EIRs.
 5. On 1 December 2011, Mr Nolan 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.
 6. The application was validated by establishing that Mr Nolan 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

7. Before formally inviting its submissions on this case, the investigating officer contacted the Council to discuss the case. The Council subsequently reconsidered its position and, on 3 April 2012, it disclosed the information requested by Mr Nolan in full, and at no charge.
8. The investigating officer contacted Mr Nolan to ask if he wished to continue with his application to the Commissioner in the light of the fact that he had received the information from the Council.
9. Mr Nolan responded that he wished the Commissioner to make a ruling on whether his request should have been dealt with under FOISA rather than under the EIRs.
10. The investigating officer contacted the Council on 11 April 2012, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA, read with regulation 17 of the EIRs) and asking it to respond to specific questions. In particular, the Council was asked to explain why it regarded the withheld information as falling within the definition of environmental information.
11. On 12 April 2012, the Council responded stating that it had no further submissions to make in addition to those already stated in its response to Mr Nolan's request for review.
12. The relevant submissions received from both the Council and Mr Nolan will be considered in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

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

Section 39(2) of FOISA – environmental information

14. The Commissioner has not departed from the thinking of the previous Commissioner who set out his views on the relationship between FOISA and the EIRs in detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*. It need not be repeated in full here, although the Commissioner would reiterate some of the key points:
 - The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition of environmental information in the EIRs.
 - There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.



- Any request for environmental information therefore must be dealt with under the EIRs.
 - In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
15. In the present case, the Council submitted that it was entitled to withhold the information requested by Mr Nolan under section 39(2) of FOISA, on the basis that it was environmental information. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs, the relevant paragraphs of which are reproduced in the Appendix below.
16. Mr Nolan submitted that he had read the Commissioner's briefing on the EIRs¹ and was of the view that nowhere in the document was there any reference to snow or ice or the clearing of pathways. He also asserted that information relating to the subject matter of his request had been given to a third party as part of a Freedom of Information request.
17. The Commissioner would emphasise that it is not within the remit of this decision for her to comment on how the Council may have responded to other similar requests made to it by other individuals. She can only determine whether or not the information requested in this particular case is environmental information or not.
18. In its submissions, the Council commented that the request specified information relating to road and path inspections. Given the terms of the request, the Council considered that the requested information would fall within the definition of environmental information set out in regulation 2(1) of the EIRs, specifically paragraphs (a) and (c) of that definition.
19. Having considered the nature of the information requested by Mr Nolan, and the definitions in parts (a) and (c) of the definition of environmental information, the Commissioner is satisfied that the requested information comprises of environmental information as defined within regulation 2(1)(c) of the EIRs.
20. She considers that inspections of pathways and associated reports, procedures and policies relating to the Council's activities to clear snow and ice from pavements are measures and activities (for the purposes of part (c) of the definition) which are likely to affect the state of the elements of the environment as defined in part (a). In particular, these measures and activities are likely to affect the land, soil, landscape and water (in the form of ice and snow).
21. This is in line with the reasoning of the previous Commissioner in similar cases where the information relating to public footpaths was held to fall within the terms of the EIRs, for example *Decision 065/2012 Ms Patricia Forrester and City of Edinburgh Council* where the Commissioner concluded that details of information in respect of findings of any inspections and actions deemed necessary, and details of maintenance and resurfacing of the public footpath/pavement of the locus, fell within the EIRs.

¹ <http://www.itspublicknowledge.info/uploadedfiles/EIRGuidance.pdf>



22. Similarly, in another case, *Decision 068/2012 Mrs Anne Ewen and the City of Edinburgh Council* the previous Commissioner decided that similar information (on complaints or accidents reported by members of the public in relation to a specific public footpath and for details of maintenance work, etc. carried out to the footpath) was environmental information.
23. The exemption in section 39(2) of FOISA provides, in effect, that environmental information as defined by regulation 2(1) of the EIRs is exempt from disclosure under FOISA, thereby allowing such information to be considered in terms of the EIRs. 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 considered to be environmental information.
24. This exemption 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 also accepts that the public interest in maintaining this exception and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA.

DECISION

In respect of the matter specified in Mr Nolan's application for decision, the Commissioner finds that the City of Edinburgh Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Nolan.

The Commissioner finds that by identifying the information requested as environmental information as defined by regulation 2(1) of the EIRs, the Council complied with the EIRs in responding to the information request made by Mr Nolan as one made under the EIRs.

Since the Commissioner is satisfied that the requested information was exempt from disclosure under section 39(2) of FOISA, she finds that the Council did not breach of Part 1 of FOISA by refusing to disclose the information in terms of FOISA.

Appeal

Should either Mr Nolan or the City of Edinburgh 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 notice.

Decision 100/2012
Mr Paul Nolan
And City of Edinburgh Council



Margaret Keyse
Head of Enforcement
18 June 2012



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.

...

- (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.

...