

Decision Notice 106/2020

Water of Leith Walkway

Applicant: The Applicant

Public authority: City of Edinburgh Council

Case Ref: 202000164



Scottish Information
Commissioner

Summary

The Council was asked for communications between it and Miller Homes about the Water of Leith Walkway. The Council considered the request under the EIRs, and issued a fees notice under regulation 8. The Applicant disputed that he had requested environmental information.

The Commissioner found that the information was environmental information and that the Council had correctly considered the request under the EIRs.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a), (c) and (f) of definition of “environmental information”); 5(1) and (2)(b) (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 April 2019, the Applicant made a request for information to the City of Edinburgh Council (the Council). The information requested was for:
Correspondence, in both directions, since January 2017 between Edinburgh Council officials and Miller Homes in relation to the Water of Leith Walkway between Newhaven Road and Anderson Place Bridge, Edinburgh.
2. The Council wrote to the Applicant on 14 May 2019 and advised him that, due to the amount of information covered by the request, it could not respond within 20 working days, but hoped to do so by 21 May 2019.
3. The Council responded on 21 May 2019. It informed the Applicant that it had considered his request under the EIRs. The Council issued the Applicant with a fees notice for £218.70 under regulation 8 of the EIRs.
4. On 23 May 2019, the Applicant wrote to the Council, requesting a review of its decision as he did not consider his request to be seeking environmental information. Given that this email expressed the Applicant’s dissatisfaction with the Council’s response, the Commissioner considers it to be a valid request for review.
5. The Council responded to the Applicant’s request for review on 31 July 2019, explaining the costs involved.
6. On 2 August 2019, the Applicant wrote to the Council and sought a further review, again expressing his dissatisfaction on the basis that he had not sought environmental information. As this email was sent to the Council more than 40 working days after the date of the initial response of 21 May 2019, it cannot be considered as a valid request for review. In any event, as mentioned above, the Commissioner considers the email of 23 May 2019 to have been the valid request for review (and the response to 31 July 2019 was therefore a valid review outcome).

7. The Council responded to the Applicant's email of 2 August 2019 on 16 August 2019, upholding its decision to deal with the request under the EIRs, explaining that it had taken cognisance of previous decisions issued by the Commissioner.
8. On 30 January 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 did not agree that his request should have been dealt with under EIRs (with reasons).

Investigation

9. 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.
10. Given that the basis of the Applicant's requirement for review and his application to the Commissioner was whether the Council was correct to consider the request under the EIRs (i.e. whether the information requested could properly be considered environmental), this must form the basis of the Commissioner's investigation.
11. On 12 February 2020, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the information withheld from the Applicant. The Council provided the information and 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 in relation to its handling of the Applicant's request.
13. The Council responded to the Commissioner, acknowledging that in responding to the Applicant it should have provided a better explanation as to why it considered the EIRs applied to the request and advised him that it was relying on section 39(2) of FOISA (which exempts requests for environmental information under FOISA, allowing them to be dealt with under the EIRs).
14. The Council maintained that it had correctly considered the request under the EIRs. The Council also commented that, given its poor handling of the Applicant's request, it considered it appropriate to waive the charge for making the information available on this occasion.
15. On 23 July 2020, the Council wrote to the Applicant and apologised that its handling of the request fell below the standard that it would normally expect, in particular that it did not provide appropriate assistance and advice concerning the Council's use of the EIRs. It explained it was waiving the fee previously applied and provided the Applicant with the information held, subject to the redaction of personal data under regulation 11(2) of the EIRs.
16. The Applicant acknowledged receipt of the disclosure by the Council, but asked the Commissioner to come to a decision on whether the Council was correct in considering the request to be a request for environmental information.

Commissioner's analysis and findings

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

Handling in terms of the EIRs

18. The Council dealt with the Applicant's request under the EIRs, having concluded that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
19. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various qualifications and exceptions contained in the EIRs. These include the charging provisions in regulation 8, but the Commissioner has not been asked to look at the Council's application of those provisions. The Applicant has identified the charging regime as a potentially undesirable consequence of information being found to be environmental, but Scottish public authorities have no option but to apply the EIRs regime to information which falls within any part of the definition: another regime (i.e. FOISA) may be available for the information in question, as the Applicant has argued, but that does not remove the obligation to deal with environmental information in accordance with the regulations designed for that purpose.
20. In its submissions to the Commissioner, the Council stated that, in determining the appropriate legislation applicable to the information request, it had been guided by *Decision 027/2012: David Cardwell and Dundee City Council*¹. This decision referred to *Decision 218/2007 Professor A D Hawkins and Transport Scotland*², where the Commissioner set out his thinking on the relationship between FOISA and the EIRs in some detail, the key points being:
- (a) The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition of environmental information in the EIRs.
 - (b) 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.
 - (c) Any request for environmental information therefore must be dealt with under the EIRs.
 - (d) In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
21. In this current case, the Council stated that it had concluded the information requested by the Applicant was environmental information, based on the above decisions and consideration of the following paragraphs (a), (c) and (f) of the definition in regulation 2 of the EIRs (reproduced in Appendix 1).
22. In his submissions to the Commissioner, the Applicant argued that the information he had requested should not be regarded as environmental information. He made reference to previous decisions issued by the Commissioner and stated that, having considered the

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2012/201101257.aspx>

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200600654.aspx>

definition of “environmental information”, he saw no reason for the definition to be viewed narrowly or generously. He submitted that previous decisions took a far too ambitious interpretation of what should be considered environmental, in the tradition of Aarhus, extending to all aspects of footpaths and roads and their upkeep, costs and administration, without reference to authority beyond the Commissioner’s own decisions.

23. The Commissioner also notes the Applicant’s comments in relation to the adequacy of the Council’s references to relevant decisions. However, if he accepts that the information the Applicant is seeking is environmental information as defined in regulation 2(1), he cannot find in the Applicant’s favour simply because of any such shortcomings in the Council’s submissions.
24. Whether the information requested in any given case is environmental information will depend on the wording of the request, but also on the information actually held by the authority and falling within the scope of the request. The Aarhus Convention: Implementation Guide (the Guide)³, is clear enough on the duty to interpret the definition broadly, in line with the underlying purpose of the Convention.
25. The Commissioner considers the broad interpretation of what is “environmental information”, is one of the fundamental pillars of Aarhus. An example of this can be found at page 50 of the Guide, which states:

Article 2, paragraph 3, does not attempt to define “environmental information” in an exhaustive manner but rather breaks down its scope into three categories and within each category provides an illustrative list. These lists are likewise non-exhaustive, and so they require a degree of interpretation on the part of authorities in a given case. The clear intention of the drafters, however, was to craft a definition that would be as broad in scope as possible, a fact that should be taken into account in its interpretation.
26. The Commissioner’s guidance on “What is Environmental Information”⁴ explains the consideration required when deciding whether a request falls to be considered under the EIRs. At paragraph 6 of this Guidance, the Commissioner advises that:

No types of information are excluded from the potential ambit of environmental information. Environmental information may be found in or extend beyond what is not specifically an environmental topic. Court cases have confirmed that environmental information, and the scope of the Directive [Directive 2003/4/EC, which the EIRs implement]], should be interpreted broadly.
27. One such court case referred to in the guidance is the Court of Appeal Decision: *Department for Business, Energy and Industrial Strategy v Information Commissioner [2017] EWCA Civ 844*⁵. This acknowledges that the Directive is to be given a broad meaning. The information will not necessarily be intrinsically environmental, the line (between information that is environmental and information that is not) being drawn by reference to the general principle that the EIRs, the Directive, and the Aarhus Convention must all be construed purposively, considering both fact and context. The Court places weight on the key underlying requirement, in both the Convention and the Directive, that citizens have access to information enabling them to participate in environmental decision-making more effectively,

³ http://www.unece.org/env/pp/implementation_guide.html

⁴ <http://www.itspublicknowledge.info/Law/EIRs/WhatIsEnvironmentalInformation.aspx>

⁵ <http://www.bailii.org/ew/cases/EWCA/Civ/2017/844.html>

and the contribution of access to a greater awareness of environmental matters and, eventually, to a better environment.

28. In this case, in the Council's view, the information is all in some way about the direct impacts of a substantial housing development on the Water of Leith Walkway, affecting the state of the elements of the environment, principally water and landscape.

The Commissioner's conclusions

29. It is clear from the Council's correspondence with the Applicant and its submissions to the Commissioner (and, indeed, the information itself) that the information falling within the scope of the request is environmental information, as defined in regulation 2(1) of the EIRs. The Commissioner acknowledges that the focus of the information is the impact of the housing development. He accepts, as the Council has claimed, that the information relates to impacts on land and landscape, both of which are elements of the environment as defined in regulation 2(1). As the Council has stated, this is consistent with the view reached by the Commissioner in previous decisions: in any case, whether or not all information relating to footpaths should properly be considered environmental, the Commissioner is satisfied that the information which is the subject of this decision is.
30. In all the circumstances, the Commissioner is satisfied that the information requested by the Applicant and held by the Council falls within the definition of environmental information set out in regulation 2(1), in particular paragraphs (a), (c) and (f) of that definition. The Council was therefore obliged to deal with the request under the EIRs.

Decision

The Commissioner finds that, in the matters raised in the application to the Commissioner, City of Edinburgh Council was entitled to consider the request as a request for environmental information. By doing so, it complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the Applicant.

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 September 2020

Appendix 1: Relevant statutory provisions

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;

...

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

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.

...

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