

Decision Notice

Decision 109/2016: Company X and Dundee City Council

Risk assessments and site rules

Reference No: 201600216
Decision Date: 9 May 2016



Scottish Information
Commissioner

Summary

On 23 November 2015, Company X asked Dundee City Council (the Council) for copies of risk assessments and site rules.

The Council refused to comply with the request on the grounds that it was vexatious, in terms of section 14(1) of FOISA. Following a review, Company X remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the request was not vexatious (or manifestly unreasonable in terms of the EIRs). She also found that the Council failed to identify parts of the information as environmental and to respond to the request within statutory timescales.

The Commissioner required the Council to respond to Company X other than in terms of section 14(1) of FOISA and/or regulation 10(4)(b) of the EIRs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 10(1) (Time for compliance); 14(1) (Vexatious or repeated requests)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definition of "environmental information"); 5(1) and (2) (Duty to make available environmental information on request); 10(1), (2) and (4)(b) (Exceptions from duty to make environmental information available); 16(4) (Review by Scottish public authority).

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 23 November 2015, Company X made a request for information to the Council. Company X asked for copies of all of the:
 - (i) risk assessments used by the Environment Department of the Council
 - (ii) site rules for all sites operated by the Council.
2. The Council responded on 23 December 2015 and cited section 14(1) of FOISA. It was of the view that Company X's request was vexatious and provided reasons for taking this view.
3. On 24 December 2015, Company X wrote to the Council, requesting a review of its decision and giving reasons why it did not consider the request to be vexatious. Company X also submitted that the Council's response had been outwith the statutory timescale.
4. The Council notified Company X of the outcome of its review on 26 January 2016. It upheld its application of section 14(1) of FOISA. It provided a sample of its risk assessments.
5. On 28 January 2016, Company X wrote to the Commissioner. Company X applied 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 specified modifications. Company X did not agree that the request was vexatious and also submitted that the Council had responded to its requirement for review outwith the statutory timescale.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Company X 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.
7. On 5 February 2016, the Council was notified in writing that Company X had made a valid application and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was asked to respond to specific questions, particularly in relation to its reasons for finding Company X's request to be vexatious. It was also asked whether, given the nature of the information sought, it should have handled the request under the EIRs.
9. The Council and Company X both provided submissions during the investigation. The Council also provided a sample of the requested information.

Commissioner's analysis and findings

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

Did the request fall to be decided under the EIRs or FOISA?

11. The relationship between FOISA and EIRs was considered at length in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹. Broadly, in the light of that decision, the Commissioner's general position is as follows:
 - (i) The definition of what constitutes environmental information should not be viewed narrowly.
 - (ii) 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.
 - (iii) Any request for environmental information therefore **must** be dealt with under the EIRs.
 - (iv) In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
 - (v) If the authority does not choose to claim the section 39(2) exemption, it must respond to the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these).

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.aspx>

- (vi) Where the Commissioner considers a request for environmental information has not been dealt with under the EIRs she is entitled (and indeed obliged) to consider how it should have been dealt with under that regime.
12. Given the content of parts of the information, the Commissioner found it appropriate to consider whether the information requested by Company X should properly be regarded as environmental information and therefore subject to the EIRs. In response to a request for comments on this point, the Council accepted that parts of the information could be regarded as environmental.
 13. The Commissioner considers some of the information in the withheld information to be environmental in accordance with the definition in regulation 2(1) of the EIRs (set out in full in Appendix 1). For example, safety assessments and site rules on the inhalation of insecticide, dealing with dangerous dogs, measurement of auto gas at petrol stations, the use of battery hammer drills and the uplift of refuse in icy conditions can be considered to be environmental information under paragraphs (a), (b) and (c) of the definition. The information appears to relate to administrative measures (i.e. health and safety assessments and site rules) likely to affect factors such as energy, noise and discharges into the environment (which could affect the state of the elements of the environment).
 14. The Council failed to identify the information as environmental and to respond to the initial request or review request in terms of the EIRs.
 15. The Commissioner therefore finds that the Council failed (to the extent that the information was environmental) to respond to Company X's request for information in accordance with regulation 5(1) of the EIRs.
 16. As the Council did not wish to rely upon the exemption in section 39(2) of FOISA, the Commissioner must go on to consider how the Council should have dealt with Company X's requests under both the EIRs and FOISA.

Was the request vexatious or manifestly unreasonable?

17. The Council's view was that Company X's request was vexatious and, therefore (in terms of section 14(1) of FOISA), it was not required to comply with it. In its submissions to the Commissioner, the Council stated that it would also argue that the request was manifestly unreasonable for the purposes of regulation 10(4)(b) of the EIRs, should the Commissioner consider the EIRs to apply.
18. Under the exception in regulation 10(4)(b) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request for information is manifestly unreasonable. If it finds that the request is manifestly unreasonable, it is still required to make the information available unless, in all the circumstances, the public interest in making it available is outweighed by that in maintaining the exception. In considering whether the exception applies, it must interpret it in a restrictive way and apply a presumption in favour of disclosure.
19. Section 14(1) of FOISA states that section 1(1) (which confers the general entitlement to information held by such authorities) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious. Section 14(1) does not create an exemption, but its effect is to render inapplicable the general right of access to information contained in section 1(1).

20. FOISA does not define the word "vexatious". The Commissioner's general approach, as set out in her guidance on section 14(1) of FOISA², is that the following factors are relevant when considering whether a request is vexatious. These are that the request:
- would impose a significant burden on the public body
 - does not have a serious purpose or value
 - is designed to cause disruption or annoyance to the public authority
 - has the effect of harassing the public authority
 - would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.
21. This is not an exhaustive list. Depending on the circumstances, other factors may be relevant, provided the impact on the authority can be supported by evidence. The Commissioner recognises that each case must be considered on its merits, taking all the circumstances into account. The term "vexatious" must be applied to the request and not the requester, but an applicant's identity, and the history of their dealings with a public authority, may be relevant in considering the nature and effect of the request and surrounding circumstances.
22. Where the Commissioner is satisfied that a request is vexatious for the purposes of section 14(1), she will generally also be satisfied that it is manifestly unreasonable for the purposes of regulation 10(4)(b) of the EIRs.

The Council's submissions

23. The Council provided the Commissioner with some background information about health and safety investigations.
24. The Council stated that it had considered the circumstances of the case and had come to a balanced conclusion that the request was both vexatious and manifestly unreasonable, and that it was not genuine.

Significant burden

25. The Council explained that there were many hundreds of risk assessments which would fit the criteria of the request, with 145 risk assessments in the area of the Environment Department alone. In addition, providing all the site rules of the Council would be completely disproportionate. The Council stated that, according to its Asset Register, it owned approximately 425 operational properties. To provide the site rules to Company X for all of these, with all the risk assessments, would be a significant administrative burden.
26. It was the Council's view that a request as wide as this one would be considered manifestly unreasonable and disproportionate by a reasonable person. The Council considered that it was inappropriate in the current financial climate that it should bear the excessive cost of collating all the information.

Serious purpose or value

27. It was the Council's position that the request did not have a serious purpose or value. It stated that Company X had failed to provide it with risk assessment documentation for its

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Section14/Section14Overview.aspx>

own site and it considered the request in this context. It had therefore provided Company X with examples of risk assessments and site rules which would be of relevance to a facility such as theirs.

28. The Council was of the view that the information would be of limited value to Company X in relation to a potential prosecution. To be required to provide any more would, it submitted, be manifestly unreasonable and disproportionate.

Disruption and annoyance

29. The Council took the view that the request was designed to cause disruption and annoyance to it, and in particular to intimidate and obstruct it in its enforcement functions.

Company X's submissions

30. Company X submitted that it had made a legitimate and genuine request for assistance. Company X stated that the Council, as the enforcing authority for health and safety practice for many businesses in the city, should be an exemplar of how risk assessments should be framed and presented. As such, companies and employees of companies such as Company X should be able to compare the quality, breadth and depth of their own risk assessments against those of the Council.
31. In June 2015, Company X submitted, the Council undertook activities in similar circumstances to those relating to an accident at Company X's own company's premises, after which the Council allegedly reported that it did not prepare a specific risk assessment because such risk assessments were not necessary. Company X stated that it was in the public interest for the information to be disclosed because the public should be able to know that the Council was complying with its legal obligations to have risk assessments in place for its various activities.
32. It was Company X's view that the information requested should be easily and readily available, and that the Council would face little or no material cost in providing it. In the review request Company X offered to contribute to the cost of providing the information. Company X was of the view that the Council should have some sort of central document management system to assist in this: it believed the Council's responses suggested that the information was readily accessible in electronic form.
33. The Council was, Company X contended, seeking to quantify the "significant burden" in terms of the resources available to the health and safety investigation rather than its overall resources. Company X did not consider this to be the correct approach, but did not believe providing the information would have any detrimental impact on the investigation. It denied that the information request was retaliatory in response to a Council investigation.

The Commissioner's findings

Significant burden

34. In the Commissioner's briefing on section 14(1) and regulation 10(4)(b) of the EIRs (see above) she indicates that a request will impose a significant burden on a public authority where dealing with it would require a disproportionate amount of time and the diversion of an unreasonable proportion of its financial and human resources away from its other statutory or core operations.
35. Having considered the Council's submissions carefully, along with the wording of the request under consideration here, the Commissioner does not accept that the request in this instance can be construed as involving a significant burden. The Council claimed responding would

impose a significant burden but failed to quantify the cost, and the time and work that would be involved in collating the information. Nor has it given any explanation as to what documentation systems it would need to access or what electronic information systems it would have to interrogate.

36. The Council appears to have asked the Commissioner to accept on face value alone that complying with the request would be burdensome. It refers to a relatively large number of documents, but fails to explain what would be involved in providing the applicant with these.
37. The Commissioner has not been provided with sufficient evidence to accept that disclosure would place a significant burden on the Council. She is of the view that a reasonable person could not conclude from the Council's submissions that such a significant burden would result from providing the information to Company X.

Serious purpose and value

38. The Commissioner is not satisfied, on the evidence presented to her, that she has any basis for concluding the request to have no serious purpose or value.
39. On balance, the Commissioner does not find the Council's arguments about purpose and value outweigh Company X's. The Council gave general, unsupported assertions while Company X gave rational arguments about why the request had a serious purpose to them. Company X appears to have a genuine belief that the Council may be failing to comply with health and safety requirements and that this is relevant to its defence of enforcement action being taken against them. It is not for the Commissioner to make a finding on whether the information would, in fact, be of value for this purpose (ultimately, that would be a matter for the courts) but only to consider whether the request from Company X was vexatious or manifestly unreasonable.

Disruption and annoyance

40. The Council submitted that the request was designed to cause disruption and annoyance to it, and in particular to intimidate and obstruct it in its enforcement functions. It made an assertion to this effect, but, again, provided nothing of real substance to substantiate the claim. It did not explain how the performance of these functions would be impeded by providing the information.

Conclusions

41. For the reasons set out above, the Commissioner must find that the Council was not entitled to refuse to comply with Company X's request under section 14(1) of FOISA. She also finds that the Council was incorrect in its application of regulation 10(4)(b) to Company X's request.
42. Having reached this finding, the Commissioner is not required to consider the public interest test in regulation 10(1)(b) of the EIRs.
43. The Council is therefore required to respond to Company X's request in accordance with the requirements of FOISA (other than in terms of section 14(1)) and the EIRs (other than in terms of regulation 10(4)(b)). In other words, it is required to carry out a fresh review, with an outcome in terms of section 21(4)(b) of FOISA and regulation 16 of the EIRs.

Timescales and administrative inaccuracies

44. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is

subject to qualifications which are not relevant in this case. The same timescale is laid down by regulation 5(2)(a) of the EIRs.

45. It is a matter of fact that the Council did not provide a response to Company X's request for information within 20 working days, so the Commissioner finds that it failed to comply with section 10(1) of FOISA and regulation 5(2)(a) of the EIRs. The Council failed to address this in carrying out a review, although it was raised by Company X in seeking one.
46. As the Council provided a response to Company X on 23 December 2016, the Commissioner does not (on this occasion) require any action to be taken in relation to this breach.
47. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review. Again, this is subject to qualifications which are not relevant in this case. The same timescale is laid down by regulation 16(4) of the EIRs.
48. Taking into account the public holidays over the period, the Commissioner notes that the Council did provide a response to Company X's requirement for review within 20 working days. Therefore the Commissioner finds that it complied with section 21(1) of FOISA and regulation 16(4) of the EIRs.
49. On being asked by the investigating officer to comment on four administrative inaccuracies (three erroneous dates and an erroneous paragraph number) in its correspondence with Company X, the Council accepted it had made these clerical errors and apologised for all of the errors and also for the late initial response.
50. While the administrative errors were not breaches of FOISA, such errors do not inspire whoever is in receipt of a response containing them to have confidence in the provider. The Commissioner considers that it would have been good practice for the Council to have exercised more due care and attention when handling this request, and suggests that it does so in dealing with future cases.

Decision

The Commissioner finds that Dundee City Council (the Council):

- (i) failed to deal with Company X's request in accordance with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA), as she does not accept that it was entitled to refuse to comply with the request under section 14(1) of FOISA.
- (ii) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in dealing Company X's for information. In particular, the Council failed to comply with regulation 5(1) of the EIRs by failing to identify some of the information requested as environmental information (as defined in regulation 2(1)) and handle the relevant parts of the request accordingly under the EIRs.
- (iii) was not entitled to refuse to comply with the request as manifestly unreasonable under regulation 10(4)(b) of the EIRs.
- (iv) failed to comply with section 10(1) of FOISA and regulation 5(2)(a) of the EIRs in failing to respond to the request timeously. She does not require any action in relation to this breach, in response to Company X's application.

The Commissioner requires the Council to respond to Company X in accordance with the requirements of FOISA (other than in terms of section 14(1)) and the EIRs (other than in terms of regulation 10(4)(b)), by 23 June 2016.

Appeal

Should either Company X or Dundee City 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.

Rosemary Agnew
Scottish Information Commissioner

9 May 2016

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.

10 Time for compliance

(1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

(a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or

(b) in a case where section 1(3) applies, the receipt by it of the further information.

...

14 Vexatious or repeated requests

(1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.

...

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;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (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;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (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) -

- (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.

...

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
- ...
- (b) the request for information is manifestly unreasonable;
- ...

16 Review by Scottish public authority

- ...
- (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.

Scottish Information Commissioner

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