

Decision Notice

Decision 111/2016: Mr Amir Aryan Manesh and Glasgow City Council

Information regarding a named property

Reference No: 201501065

Decision Date: 10 May 2016



Scottish Information
Commissioner

Summary

On 6 January 2015, Mr Aryan Manesh asked Glasgow City Council (the Council) for information regarding a named property, a request he clarified on 27 January 2015.

The Council responded on 11 February 2015, and provided Mr Aryan Manesh with a range of documents falling within the scope of his request, with personal data redacted. Following a review, he remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had failed to respond to Mr Aryan Manesh's request for information in accordance with Part 1 of FOISA. The Council had wrongly handled his request under the EIRs when it should have been handled under FOISA.

The Commissioner required the Council to issue a new review outcome to Mr Aryan Manesh that complied with Part 1 of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(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) (paragraphs (a), (b), (c) and (f) of definition of "environmental information")

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 6 January 2015, Mr Aryan Manesh made a request for information to the Council, as follows:

"I have a flat at [named address]. My neighbour, who occupies flat [number redacted] [has] been flooding my flat regularly every few months since I bought this flat in 2010. I have reported this several times to environmental services public health to deal with this issue. I would like as much information as possible that is available, regarding the requests and correspondence I have made. Including any information on the property prior to 2010."
2. Mr Aryan Manesh clarified this request on 27 January 2015 and explained that he was looking for information dating from January 2008 to the present date.
3. The Council wrote to Mr Aryan Manesh on 23 January 2015, and advised him that the information he had requested was environmental information and that his request therefore required to be handled under the EIRs rather than FOISA. The Council noted that regulation 8 of the EIRs permitted it to charge a fee to provide information and stated that it would cost Mr Aryan Manesh £62.44 to obtain the information he had requested. Mr Aryan Manesh paid this fee on 27 January 2015.
4. On 11 February 2015, the Council responded to Mr Aryan Manesh's request. In its response, the Council provided him with a range of documents falling within the scope of his request. It

had redacted personal data from those documents, withholding this information under regulation 11(2) of the EIRs. The Council concluded that it had complied with his request.

5. On 25 February 2015, Mr Aryan Manesh wrote to the Council requesting a review of its decision. He did not accept that the Council had identified and disclosed to him all relevant information and gave a number of examples of contact he had had with the Council where he expected it to hold additional information.
6. The Council did not respond to this request for review and, on 18 March 2015, Mr Aryan Manesh submitted a new request for review, reiterating his view that some information was missing from the documents provided to him by the Council.
7. The Council notified Mr Aryan Manesh of the outcome of its review on 29 May 2015 and apologised for the delay in responding. In its review outcome, the Council upheld its previous reliance on regulation 11(2) to withhold personal data. It notified Mr Aryan Manesh that it had identified some additional information covered by his request, and it was withholding this information under regulation 10(4)(e) of the EIRs (internal communications).
8. On 8 June 2015, Mr Aryan Manesh 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. Mr Aryan Manesh stated he was dissatisfied with the outcome of the Council's review because he did not believe that the Council had identified all of the information he had requested, and did not accept that the exception in regulation 10(4)(e) had been correctly applied to the withheld information. He also queried the charge made by the Council for providing him with information.

Investigation

9. The application was accepted as valid. The Commissioner confirmed that Mr Aryan Manesh 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.
10. On 17 June 2015, the Council was notified in writing that Mr Aryan Manesh had made a valid application. The Council was asked to send the Commissioner the information withheld from him. The Council provided the information and the case was allocated to an investigating officer.
11. 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 answer specific questions including justifying its reliance on any provisions of the EIRs it considered applicable to the information requested.

Commissioner's analysis and findings

12. 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 her by both Mr Aryan Manesh and the Council. She is satisfied that no matter of relevance has been overlooked.

EIRs or FOISA?

13. The Council handled Mr Aryan Manesh's information request under the EIRs. During the investigation, the Council was asked why it considered the information to be environmental. The Commissioner noted that, while the withheld information does relate to a built structure (paragraph (f) of regulation 2(1) of the EIRs), it does not appear to have been affected by the state of the elements of the environment (that is, the elements set out in paragraph (a) of regulation 2(1) of the EIRs – see Appendix 1). The water damage affecting Mr Aryan Manesh's flat appeared to have been caused by an internal plumbing issue, rather than any element of the environment.
14. In its response, the Council submitted that the subject matter of the requested information is a dispute over water penetration to a flat, potentially being caused by the actions of an upstairs neighbour. The Council stated that water is listed in regulation 2(1)(a) of the EIRs to be a "factor of the element". It noted that the information covered by Mr Aryan Manesh's request is held by the Council's Environmental Health Team. The Council submitted that this Team issued a section 80 abatement notice under the Environmental Protection Act 1990 (the EPA) on the upstairs neighbour. The Council noted that the Commissioner has previously determined that information relating to section 80 notices is environmental information, and it referred to *Decision 129/2007 Macroberts Solicitors and Aberdeenshire Council*¹.
15. The Council therefore considered that the withheld information met the definition of environmental information set out in regulation 2(1)(f) of the EIRs. The Council considered the withheld information to relate to "*conditions of human life and built structures in as much as they are or may be affected by the state of the elements...*" (in this instance, water).
16. The Commissioner has considered the Council's comments but she is not persuaded that the information requested by Mr Aryan Manesh is environmental information as defined in regulation 2(1) of the EIRs. It is clear from the content of the information that the information relates to a flat residence that has suffered water damage and that the likely cause of this damage is water coming from the flat above. The damage has not been caused by a flood or excessive rain or any external element of the environment, but rather it is speculated that it is a direct result of some kind of internal plumbing failure.
17. Paragraph (f) of the definition of environmental information in regulation 2(1) of the EIRs concerns built structures:

"...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)"
18. Although plumbing is an integral part of most built structures, the Commissioner does not consider, in this case, that information relating to the damage to Mr Aryan Manesh's flat as a result of plumbing failures is environmental information. The Commissioner does not accept that water directed through plumbing can be considered one of the "elements of the environment" as referred to in paragraph (a) of regulation 2(1) of the EIRs. As a result, the Commissioner does not consider that the requested information falls within the definition of environmental information as described in regulation 2(1) of the EIRs.

¹ http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200501328_200502226.aspx

19. The Commissioner notes the Council's reference to *Decision 129/2007*. In that case, the Commissioner considered a notice under section 80 of the EPA to be a measure relevant for the purposes of paragraph (c) of the definition of environmental information (paragraph 31). That comment was made in the light of the specific nuisances which gave rise to the section 80 notices being issued by Aberdeenshire Council. The notices there were substantially composed of information relating to noise and odours emissions, factors which the Commissioner was satisfied did affect the elements of the environment and which, as such, fell within the definition of environmental information contained in paragraph (b) of the definition in regulation 2(1) of the EIRs.
20. As the Commissioner does not accept that Mr Aryan Manesh's request was for environmental information, she takes the view that it should have been handled under FOISA and not the EIRs. The Commissioner requires the Council to issue a new review outcome which treats all of the information as non-environmental and provides a review outcome in terms of FOISA.

Scope of the request

21. During the investigation, Mr Aryan Manesh agreed to exclude from the scope of the request any correspondence sent or received by him.
22. The Commissioner requires the Council to take this into account when providing its review outcome under FOISA.

Fees notice issued under the EIRs.

23. The Commissioner notes that the Council has already charged Mr Aryan Manesh £62.44 under the charging provisions of the EIRs to access information in relation to this request. As the Commissioner does not consider that the Council was entitled to process the request under the EIRs, she requires the Council to refund this money to Mr Aryan Manesh unless it can demonstrate that such charges are still applicable under the FOISA charging regime.
24. When calculating charges, the Commissioner would remind the Council to take into account that Mr Aryan Manesh is not seeking any correspondence which he sent or received.

Decision

The Commissioner finds that Glasgow City Council failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Aryan Manesh.

The Commissioner finds that the Council was wrong to respond in terms of the EIRs to a request for information which was not environmental, and should have responded in terms of FOISA.

The Commissioner requires the Council to provide Mr Aryan Manesh with a new review outcome by **24 June 2016**.

Appeal

Should either Mr Aryan Manesh or Glasgow 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 Glasgow City Council (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

11 May 2016

Appendix 1: 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 –

...

- (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;

...

- (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);

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