

Decision Notice

Decision 117/2019: Mr R and City of Edinburgh Council

St James Quarter

Reference No: 201802116

Decision Date: 13 August 2019



Scottish Information
Commissioner

Summary

The Council was asked about a lease of land related to the redevelopment of the St James Centre.

The Council stated that it did not hold the information.

After an investigation, the Commissioner agreed the Council did not hold the information, but found that the Council did not respond to the requirement for review within the required timescale.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 5(1) and 2(b) (Duty to make available environmental information on request); 10(1), (2) and 4(a) (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 11 January 2018, Mr R made a request for information to City of Edinburgh Council (the Council). Mr R requested information related to the redevelopment of the St James Centre, in particular information related to the lease of a specified area of land. He specifically sought:

“... the contract or lease between the Council and the Developer of the St James Centre redevelopment site that both [named individuals] assert exists over land that is within the Co-Owner’s of 23-26 St James Square title boundary.”
2. The Council responded on 19 February 2018. Regarding Mr R’s request for information, it explained that it was handling his request in terms of the EIRs. It explained that it was difficult to know which contract the named individuals had referred to, but it made an assumption that it was likely they were referring to either a Growth Accelerator Model agreement or to a Land Acquisition Agreement. On that basis, the Council stated that the information was excepted from disclosure under regulation 10(5)(e) (confidentiality of commercial or industrial information) of the EIRs.
3. On 8 April 2018, Mr R wrote to the Council, requesting a review of its decision. Mr R was dissatisfied with the time taken to respond to his request and the Council’s application of regulation 10(5)(e).
4. The Council notified Mr R of the outcome of its review on 13 June 2018. The Council explained to Mr R that the Council and developer had not agreed a lease over the land owned by the co-owners of 23-26 St James Square, and therefore no information was held, that fell within the scope of his request. As a result, it was now applying regulation 10(4)(a) of the EIRs. The Council went on to advise that it was negotiating a long lease over the land in question. As negotiations were ongoing, regulation 10(5)(e) would apply to any information held in relation to the potential lease.

5. On 6 December 2018, Mr R wrote to the Commissioner. He 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. Mr R was not satisfied with the time taken to respond to his request for review and the exceptions applied by the Council.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr R 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.
7. On 16 January 2019, the Council was notified in writing that Mr R had made a valid application. The Council was asked to send the Commissioner the information that appeared to have been withheld from Mr R. The Council provided the information 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 invited to comment on this application and to answer specific questions. These related to the handling of this request and the exceptions relied upon by the Council.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both Mr R and the Council. He is satisfied that no matter of relevance has been overlooked.
10. As they are mutually exclusive exceptions, the Council was asked to explain why it was relying on both regulations 10(4)(a) and 10(5)(e) in responding to Mr R's request. In its submissions to the Commissioner, the Council confirmed its reliance on regulation 10(4)(a) of the EIRs, as explained below.

Regulation 10(4)(a)

11. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold the information when the applicant's request is received. This exception is subject to the public interest test in regulation 10(1)(b) of the EIRs, so can only apply if, in all the circumstances, the public interest in maintain the exception outweighs the public interest in making the information available (although, logically, it is highly unlikely that there will ever be a public interest in disclosing information which is not, in fact, held).
12. In his application to the Commissioner, Mr R queried why the Council would, on the one hand, state that the information was not held, but then claim to withhold the information under regulation 10(5)(e).
13. The Council submitted that it relied on regulation 10(4)(a) in response to Mr R's request for:
"... the contract or lease between the Council and the Developer of the St James Centre [...] that is within the Co-owner's of 23-26 St James Square title boundary"

14. The Council submitted that there was no such contract or lease. It explained its position that it owned the land in question, and had adopted and maintained the pavement and ramp, and so did not consider the land to be within the title boundary of the co-owners of 23-26 St James Square.
15. The Council submitted that no searches were thought necessary to establish that no information was held, as the Council's position in respect of ownership of the land had been previously established and notified to those concerned.
16. The Council explained that there had been extensive correspondence with Mr R and the other owners at 23-26 St James Square, as they disputed the Council's position. The Council stated that, during this correspondence, the co-owners and Mr R had been advised that they should seek independent legal advice if they wished to challenge this.
17. To assist Mr R, the Council explained, it went on to consider the request as being for "the contract or lease between the Council and the Developer of 23-26 St James Centre that covers the area of pavement and ramp outside of 23-26 St James Square" and it was to this request that the Council applied regulation 10(5)(e).

Conclusions

18. The Commissioner has considered the explanations provided by the Council for its application of regulation 10(4)(a). He has also considered, in detail, the submissions made by Mr R. Given the clear fundamental difference of opinion between the Council and Mr R in relation to ownership of the land in question, and the terms of the request, the Council could not reasonably have been expected to respond to Mr R's request otherwise than under regulation 10(4)(a).
19. The Commissioner's remit extends only to consideration of whether the Council complied with the EIRs in responding to Mr R's request and not to provide any commentary/confirmation or views on ownership of the land in question.
20. In this instance, the Commissioner is satisfied that the information is not (and was not, on receipt of the request) held by the Council. As he is satisfied that the Council does not hold the information Mr R, he does not consider there to be any conceivable public interest in requiring that the information be made available. The Commissioner is satisfied that he Council was entitled to refuse Mr R's request under regulation 10(4)(a).
21. The Commissioner notes that the Council's application of regulation 10(5)(e), to information outwith the scope of his request, was made in an attempt to provide advice and assistance.

Timescales

22. Regulation 16(4) of the EIRs 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.
23. Mr R's requirement for review was received by the Council on 9 April 2018. The Council explained that, on receipt, it was not clear from the initial response to the request what contract or agreement was being referred to. The Review Officer undertook to resolve this and on 8 May 2018 received clarity on the issue. A response was issued on 13 June 2018. The Council acknowledged that its review response was late and expressed its regret, but in this instance it believed it was important that the review was properly and fully conducted.
24. While the Commissioner notes this explanation, it is matter of fact that the Council did not provide a response to Mr R's requirement for review within 20 working days. The

Commissioner must, therefore, find that the Council failed to comply with regulation 16(4) of the EIRs in this regard.

Decision

The Commissioner finds that City of Edinburgh Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr R.

The Commissioner finds that the Council did not hold information falling within the scope of the request and so correctly applied regulation 10(4)(a).

However, in failing to respond to Mr R's requirement for review within the required timescale, the Council failed to comply with regulation 16(4) of the EIRs.

The Commissioner does not require the Council to take any action in respect of this failure, in response to Mr R's application.

Appeal

Should either Mr R 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

13 August 2019

The Environmental Information (Scotland) Regulations 2004

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.

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
 - (a) it does not hold that information when an applicant's request is received;
- ...

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

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info