

Decision Notice 118/2021

Evidence held by a Planning Case Officer

Applicant: The Applicant

Public authority: East Dunbartonshire Council

Case Ref: 202100459



Scottish Information
Commissioner

Summary

The Council was asked for specific information provided to it by a planning applicant. The Council refused to comply with the request, stating the information was already publicly available on the Registers of Scotland website.

The Commissioner investigated and found that the Council had failed to comply with the EIRs in responding to the request. As the information was disclosed during the investigation, the Commissioner did not require any further action to be taken.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information") (Interpretation); 5(1) (Duty to make available environmental information on request); 6(1)(b) (Form and format of 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 14 August 2020, the Applicant made a request for information to East Dunbartonshire Council (the Council). The Applicant made reference to the earlier correspondence, where he had been informed that a Planning Case Officer was in possession of evidence negating the Applicant's claim that a false declaration has been made to the Planning Authority in respect of a particular planning application. The Applicant asked for the information in the case officer's possession which negated his claim.
2. On 7 September 2020, the Council wrote to the Applicant and sought clarification as to precisely what information he was seeking.
3. Later that day, the Applicant wrote to the Council and clarified that the only information that he was seeking was "the evidence, i.e. information provided by the applicant that negates my allegation that an offence has been committed".
4. The Council responded on 29 September 2020. It advised him that it had interpreted his request as being for a copy of the Land Title documentation relating to the site associated with the planning application. It advised that the planning application had been withdrawn and was no longer under consideration by the Council. The title was undergoing formal registration by Registers of Scotland and it considered the information it held to be commercially sensitive and exempt from disclosure under section 33(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA). It stated that the information should not be released until the property was formally registered and that, once the registration was complete, the Land Title would be available via Registers of Scotland at <https://www.ros.gov.uk/>.
5. On 30 September 2020, the Applicant wrote to the Council requesting a review of its decision, on the basis that he had not sought a copy of the Land Title but had clearly requested the evidence the Case Officer stated he was in possession of, as outlined in the earlier correspondence.

6. The Council notified the Applicant of the outcome of its review on 23 October 2020. It informed the Applicant that section 33(1)(b) of FOISA had been applied incorrectly and did not apply. The request had been for environmental information and the EIRs applied. It advised the Applicant that, as the Land Title was publicly available through the paid search function on the Registers of Scotland website, it was applying regulation 6(1)(b) of the EIRs.
7. On 23 October 2020, the Applicant wrote to the Commissioner, applying 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. The Applicant stated he was dissatisfied with the outcome of the Council's review because the Council had applied an exception to information he had not requested. He stated that the information he sought was not publicly available and confirmed he had not requested a copy of the Land Title.
8. The Commissioner investigated the application of 23 October 2020, and subsequently issued *Decision Notice 053/2021*. In this, he found that the Council had a duty to respond to the specific terms of the Applicant's request, in accordance with the regulation 5(1) EIRs, which it had failed to do.
9. During the investigation into the above application, on 24 March 2021, the Council issued the Applicant with a new review outcome. It advised the Applicant that in earlier correspondence it should have been clearer as to what information was held. It confirmed it held a screenshot of the Registers of Scotland's record on the plot of land in question. It advised the Applicant that, as it understood he was already in possession of this information and the information was publicly assessible through the Registers of Scotland website, it was exempt from release under regulation 6(1)(b) of the EIRs.
10. On 13 April 2021, the Applicant wrote to the Commissioner, applying 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. The Applicant stated he was dissatisfied with the outcome of the Council's review of 24 March 2021, as he stated he did not have possession of the information and disagreed it was publicly available.

Investigation

11. 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.
12. On 22 April 2021, the Council was notified in writing that the Applicant had made a valid application. The case was then allocated to an investigating officer.
13. 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, focusing on the application of regulation 6(1)(b) of the EIRs.
14. On 13 July 2021, the Council advised the Commissioner that it had contacted Registers of Scotland and confirmed that the information withheld by the Council was no longer publicly available through Registers of Scotland. On that basis, the Council submitted that regulation 6(1)(b) of the EIRs, did not now apply. It further advised that it had provided the Applicant with the information held.

15. The Applicant acknowledged receipt of the information and wished to Commissioner to issue a decision.

Commissioner's analysis and findings

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

Application of the EIRs

17. It is clear that any information falling within the scope of the Applicant's request, which relates to aspects of a planning application having a clear impact on the elements of the environment, is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs (the relevant provisions are reproduced in Appendix 1 to this decision). The Applicant made no comment on the Council's application of the EIRs in this case and the Commissioner will consider the request in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs

18. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
19. As mentioned above, in responding to the Applicant's requirement for review, the Council relied upon the provisions of regulation 6(1)(b) of the EIRs, on the basis that it was available from the Registers of Scotland.
20. Regulation 6(1)(b) of the EIRs, provides that a Scottish public authority shall comply with a request that environmental information be made available in a particular form or format, *unless* the information is already publicly available and easily accessible to the applicant in another form or format. This is a two-part test, which must (for the regulation to apply) conclude that the information is both publicly available and easily accessible.
21. In order to determine whether the Council dealt with the Applicant's request correctly, the Commissioner must be satisfied as to whether, at the time it received the request, all the information held by the Council (and which fell within the scope of the request) was both publicly available and easily accessible.
22. In its submissions to the Commissioner, the Council advised that, during the Commissioner's investigation, it had contacted Registers of Scotland and it had been confirmed that the information held by the Council was no longer publicly available through the Registers. The Council provided no submissions to show that the information had been available from the Registers of Scotland at the time it dealt with the Applicant's request.
23. In the absence of submissions from the Council as to why the information should have been considered publicly available and easily assessible at the time it dealt with the Applicant's request, the Commissioner must conclude that the Council was not entitled to rely upon regulation 6(1)(b) in responding to the Applicant's request and that, in doing so, the Council breached regulation 5(1) of the EIRs.
24. As the Council provided the information to the Applicant during the investigation, he does not require the Council to take any action in respect of the above failure, in response to the Applicant's application.

Decision

The Commissioner finds that East Dunbartonshire Council (the Council) was not entitled to respond to the Applicant's request in terms of regulation 6(1)(b) of the EIRs and that, by doing so, it failed to comply with the Environmental Information (Scotland) Regulations 2004 (and, in particular, with regulation 5(1)).

Given that the Council disclosed the information held to the Applicant during the investigation, the Commissioner does not require the Council to take any action in respect of this failure, in response to the Applicant's application.

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

5 August 2021

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.

...

6 Form and format of information

(1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-

...

(b) the information is already publicly available and easily accessible to the applicant in another form or format.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info