

Decision Notice



Decision 123/2009 Speirs Gumley and Glasgow City Council

Dilapidation Survey

Reference No: 200900729

Decision Date: 30 October 2009

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Scottish Information Commissioner

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Summary

Speirs Gumley requested from Glasgow City Council (the Council) a dilapidation survey carried out on a specified area of quay wall. The Council responded by advising Speirs Gumley that it did not hold the information they had asked for. Following a review, Speirs Gumley remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Commissioner took the view that the information comprised environmental information and asked for the Council's comments as to whether the request should have been dealt with under the Environmental Information (Scotland) Regulations 2004 (the EIRs). The Council agreed that any information held would be environmental and that it wished to rely on section 39(2) of FOISA and the exception contained in regulation 10(4)(a) of the EIRs. Following an investigation, the Commissioner found that Council had been correct to deal with Speirs Gumley's information request by stating that it did not hold the information sought. However, the Commissioner also found that the Council failed to comply with certain technical aspects of the EIRs.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 15(1) (Duty to provide advice and assistance) and 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) and (2) (Interpretation – definition of environmental information); 9(1) (Duty to provide advice and assistance); 10(1) and (4)(a) (Exceptions from duty to make environmental information available) and 13(b) (Refusal to make information available)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Scottish Ministers Code of Practice on the Environmental Information (Scotland) Regulations 2004 for Scottish Public Authorities (the "Section 62 Code")

Decision 218/2007 Professor A D Hawkins and Transport Scotland



Background

1. On 23 January 2009, Speirs Gumley wrote to the Council requesting the information on the dilapidation survey to the quay wall serving the waterfront development (Riverview Drive, Place and Gardens) carried out for the purpose of constructing the pedestrian bridge from West Street to Broomielaw.
2. The Council responded on 1 February 2009. In its response, the Council advised Speirs Gumley that it did not hold the requested information, nor did anyone else hold the information on the Council's behalf.
3. On 23 February 2009, the Speirs Gumley wrote to the Council requesting a review of its decision. Speirs Gumley noted that the bridge was being constructed by Graham Construction on behalf of the Council.
4. The Council notified Speirs Gumley of the outcome of its review on 26 March 2009 upholding its decision that the information was not held by it, nor on its behalf by anyone else.
5. On 14 April 2009, Speirs Gumley wrote to the Commissioner, stating that they were dissatisfied with the outcome of the Council's review and applying 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 certain specified modifications.
6. The application was validated by establishing that Speirs Gumley had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

7. The investigating officer wrote to the Council on 3 June 2009, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA which, in line with regulation 17 of the EIRs, applies for the purposes of the EIRs as it applies for the purposes of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its contention that the requested information was not held by it and to provide details of the searches it had carried out to determine this. The Council was also asked to clarify whether it had taken any steps to ascertain if the information was held on its behalf by Graham Construction.
8. The Council responded on 24 June 2009, confirming that it did not hold the information requested by Speirs Gumley and explaining the steps it had undertaken to establish that this was the case.



9. The investigating officer subsequently contacted the Council advising it that, having considered the nature of the information under consideration in this case, he was of the opinion that the information, if it existed, would be environmental and therefore subject to the EIRs. The Council was asked to comment on this point and provide submissions as to whether it considered the requested information fell within the scope of any of the exceptions contained in the EIRs. The Council was also asked if it wished to rely on section 39(2) of FOISA, which allows Scottish public authorities to exempt information from disclosure under FOISA if it is environmental information which the authority is obliged to make available to the public in accordance with the EIRs.
10. In its response, the Council accepted that any information, if held by it, would more properly fall under the definition of environmental information and that it wished to rely on the exemption contained in section 39(2) of FOISA. The Council also stated that it wished to rely on the exception contained in regulation 10(4)(a) of the EIRs on the basis that it did not hold the information requested by Speirs Gumley.
11. During the investigation, Speirs Gumley provided information to the Commissioner which suggested that the Council had previously indicated that its contractor would be carrying out a survey over the area covered by the request. This is considered more fully in the Commissioner's Analysis and Findings Section below.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Speirs Gumley and the Council and is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

13. In *Decision 218/2007 Professor A D Hawkins and Transport Scotland*, the Commissioner considered the relationship between FOISA and the EIRs at some length and set out his understanding of the situation. Broadly, the Commissioner's general position on the interaction between the two regimes is as follows:
 - The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition set out in the EIRs
 - 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
 - Any request for environmental information therefore **must** be dealt with under the EIRs



- In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2)
 - If the authority does not choose to claim the section 39(2) exemption it must deal with 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)
 - The Commissioner is entitled (and indeed obliged) where he considers a request for environmental information has not been dealt with under the EIRs to consider how it should have been dealt with under that regime.
14. Environmental information is defined in regulation 2(1) of the EIRs, and this definition is reproduced in full in the Appendix to this decision. Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to the exceptions contained within regulation 10 and the provisions of regulation 11, and certain other restrictions set out in the EIRs.
15. The Commissioner considers that a dilapidation survey report such as this will contain information on the condition of the relevant portion of the quay wall which will affect, or be likely to affect the state of the elements of the environment or factors affecting, or likely to affect the elements of the environment. One purpose of such surveys is to propose measures, the ultimate intention of which are to bring about changes to the site in question which constitute environmental remediation and includes information on current environmental conditions.
16. The Commissioner therefore considers that any information, if held, would fall within the definition of environmental information contained in regulation 2(1)(a), (b) and (c) of the EIRs.

Section 39(2) of FOISA – exemption for environmental information

17. As noted above, the Council accepted, during the investigation, that any information (if held) would fall under the definition of environmental information and so indicated that it wished to apply the exemption in section 39(2) of FOISA.
18. As the Commissioner considers that the information requested by Speirs Gumley, if held by the Council, would be environmental information, he considers that the Council was correct in its application of section 39(2) of FOISA.
19. The exemption in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. Since there is a separate legislative right of access to environmental information (via the EIRs), the Commissioner also accepts that in this case the public interest in maintaining this exemption and dealing with the requests under the EIRs outweighs any public interest there may be in considering the disclosure of any information under FOISA. In what follows, the Commissioner has therefore made his decision solely in terms of the EIRs.



Whether the information requested by Speirs Gumley is held by the Council

20. 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 that information when an applicant's request is received.
21. In its initial response to Speirs Gumley on 11 February 2009 and in its response to Speirs Gumley's requirement for review on 26 March 2009, the Council stated that it did not hold the requested information.
22. In its submissions to the Commissioner, the Council explained that it had entered into a contract with Graham Construction for the construction and strengthening of quay walls on specific areas of the River Clyde in Glasgow. The Council provided the Commissioner with an extract from the contract.
23. In its submissions to the Commissioner, the Council explained that the area identified within Speirs Gumley's request was not within the scope of the Council's contract with Graham Construction and related to an area which did not require to be surveyed in terms of the contract. The Council stated that Graham Construction had not submitted a request for payment in respect of any survey carried out over the area of quay wall identified in the request.
24. The Council stated it understands that it is common practice for companies engaged in construction work to carry out surveys on their own behalf prior to undertaking construction work and that such surveys may be carried out over areas which fall outwith the area covered by the requirements of the contracted works. The Council explained that contractors may carry out such surveys, at their own cost, as a safeguard against any subsequent challenges of alleged damage to property in the course of construction works. This can be used by the contractor both as insurance against claims made to them and as evidence to substantiate damage caused in the course of construction for which the contractor may be held liable.
25. The Council explained that officers within its Property Management and Design service had conducted a thorough search of all files held by them, both manual and electronic, relating to the contract for the construction of the pedestrian bridge from West Street to Broomielaw. The Council explained which search terms had been used and the information sources which had been searched.
26. The Council confirmed that no information relevant to the request had been retrieved as a result of these searches.
27. As noted above, Speirs Gumley provided further information which it believed supported its assertion that the survey in question would be held by, or on behalf of, the Council. This comprised an email from the Council's Project Manager to Speirs Gumley in 2007 which appeared to indicate that the Council's contractor would be carrying out a dilapidation survey over the area which was the subject of Speirs Gumley's request.



28. The investigating officer subsequently contacted the Council asking for its views on the matter raised by Speirs Gumley. In response, the Council explained that the email supplied by Speirs Gumley formed part of a chain and supplied copies of the preceding emails.
29. The Council stated that the email from the Project Manager was in response to a request from Speirs Gumley for confirmation that a dilapidation survey was to be undertaken. By way of providing advice and assistance, the Project Manager contacted Graham Construction and obtained confirmation that a dilapidation survey was indeed to be carried out over the area in question.
30. The Council explained that the reference to a survey being undertaken by the Council's contractor referred to Graham Construction having commissioned a firm of engineers to carry out surveys on their (Graham Construction's) behalf. Graham Construction commissioned the surveys required of them under the contract with the Council and, in addition, commissioned a survey which was not required under the contract, was solely for Graham Construction's own use, was paid for by Graham Construction and was retained by Graham Construction.
31. Having considered the Council's submissions and its explanation of the steps taken in order to ascertain that the information in question is not held, the Commissioner is satisfied that no information falling within the scope of Speirs Gumley's request was held by the Council at the time of the request was received. The Commissioner is satisfied that the survey in question was not required by the Council and did not form part of the contract between it and Graham Construction. Consequently, the Commissioner is satisfied that the information is not held by another person on the Council's behalf and therefore is not held by the Council in terms of regulation 2(2) of the EIRs.
32. As such, the Commissioner is satisfied that the information is subject to the exception in regulation 10(4)(a) of the EIRs.
33. The exception set out in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs. Therefore, a public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception. In this case, the Commissioner is satisfied that the information in question is not (and was not at the time of Speirs Gumley's request) held by the Council. Consequently, he does not consider there to be any conceivable public interest in requiring that the information be made available.
34. The Commissioner therefore concludes that the Council was entitled to rely upon regulation 10(4)(a) of the EIRs as a basis for refusing Speirs Gumley's request.



Technical breach of the EIRs

35. Regulation 13 of the EIRs provides that, where a request to make environmental information available is refused by a Scottish public authority, the refusal must be provided in writing and must specify the authority's reasons for refusal. This should include details of any exception the authority considers applicable under regulation 10(4), 10(5) or provision of regulation 11, with the basis on which these are considered to apply, and also how the public authority has reached its decision with respect to the public interest under regulation 10(1)(b).
36. The Council's response to Speirs Gumley's request and response to their requirement for review did not comply with the requirements detailed above. In particular the Council, whilst stating that it did not hold the requested information, did not cite any exception in the EIRs it was relying upon to withhold the requested information and did not provide a consideration of the public interest test.
37. For this reason, the Commissioner has concluded that the Council failed to comply with the requirements of regulation 13(b) of the EIRs in responding to Speirs Gumley's request. However, the Commissioner does not require the Council to take any action with regard to this technical failure.

Court of Session decision

38. The Commissioner notes that the information request by Speirs Gumley was for the dilapidation survey and that in the case of *Glasgow City Council and Dundee City Council v Scottish Information Commissioner* [2009] CSIH 73, the Court of Session emphasised that FOISA gives a right to information, not documents. However, the Court also said, in paragraph 45 of its Opinion, that where a request refers to a document which may contain the relevant information, it may nonetheless be reasonably clear in the circumstances that it is the information recorded in the document that is relevant. The Court also said that, if there is any doubt as to the information requested, or as to whether there is a valid request for information at all, the public authority can obtain clarification by performing its duty under section 15 of FOISA, which requires a public authority, so far as it is reasonable to expect it to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
39. In this case, the Commissioner notes that there is no indication in the correspondence he has seen between Speirs Gumley and the Council that the Council questioned the validity of the information request. In addition, there is nothing to suggest from correspondence which the Council has subsequently had with the Commissioner that the Council was unclear as to what the information requested sought.
40. The Commissioner is satisfied that the request is reasonably clear and that the request is therefore valid.



41. He considers that the same tests will apply to requests to make environmental information available under regulation 5 of the EIRs and that the duty to provide advice and assistance under regulation 9(1) of the EIRs will also apply. He is therefore satisfied, for the same reasons as set out in paragraphs 39 and 40 above, that the request is also valid under regulation 5 of the EIRs.

DECISION

The Commissioner finds that Glasgow City Council (the Council) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the request from Speirs Gumley.

However, he finds that the Council partially failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) by failing to comply with regulation 13(b) of the EIRs.

The Commissioner does not require the Council to take any action in response to this technical failure.

Appeal

Should either Speirs Gumley or the Council wish to appeal against this decision, there is an 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 notice.

Margaret Keyse
Head of Enforcement
30 October 2009



Appendix

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.

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

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 –

...

"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);

...

(2) For the purpose of these Regulations, environmental information is held by a Scottish public authority if it is-

- (a) in its possession and it has been produced or received by that authority; or
- (b) held by another person on that authority's behalf,



and, in either case, it has not been supplied by a Minister of the Crown or department of the Government of the United Kingdom and held in confidence.

...

9 Duty to provide advice and assistance

- (1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

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.

...

- (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;

...

13 Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall -

...

- (b) specify the reasons for the refusal including, as appropriate, any exception under regulation 10(4) or (5) or provision of regulation 11 and how the Scottish public authority has reached its decision with respect to the public interest under regulation 10(1)(b);

...