

Decision Notice



Decision 123/2011 Mrs Jean Miller and South Ayrshire Council

Specified planning permission

Reference No: 201100162

Decision Date: 20 June 2011

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Kevin Dunion

Scottish Information Commissioner

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Summary

Mrs Miller requested from South Ayrshire Council (the Council) information relating to a specified planning permission. The Council responded by releasing information and explanation. Following a review, Mrs Miller remained dissatisfied and applied to the Commissioner for a decision.

During the course of the investigation, the Council provided some additional information to Mrs Miller. It also accepted that Mrs Miller's information request should have been dealt with under the Environmental Information (Scotland) Regulations 2004 (the EIRs).

Following an investigation, the Commissioner found that the Council should have dealt with the request under the EIRs. He also found that the Council partially failed to deal with Mrs Miller's request for information in accordance with the EIRs, by failing to make available all the relevant information it held or respond within the requisite timescales. However, being satisfied that the Council had taken adequate steps to make all relevant information available to Mrs Miller by the close of the investigation, he did not require the Council to take any action.

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) and 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a) and (c) of "environmental information"); 5(1) and (2) (Duty to make environmental information available on request) and 16(4) (Review by Scottish public authority)

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.

Background

1. On 3 September 2010, Mrs Miller wrote to the Council, in the course of correspondence in relation to a particular application for planning permission, requesting the following information:



- a) What changes were made between the planning report being brought to the Regulatory Panel for approval on 18 June 2009 and the final issuing of planning consent on 7 October 2009?
 - b) On what date was amended drawing PL(2)01B made available to South Ayrshire Council?
 - c) Drawing number S83483F/A/L-1A shows the lay-out of the bus lay-by on Ayr Road. When did South Ayrshire Council staff receive this drawing? When was the drawing submitted for planning permission? When was the public invited to view this drawing?
 - d) A Transportation Assessment took place prior to planning permission being granted for this site. What is the difference between the traffic volume of now and then? What is the current assessment based upon?
 - e) If traffic volume has increased, has it led to more congestion? May I have access to any notes, correspondence or comments made by South Ayrshire Council employees relating to this question? May I have access to the results of any reviews pertaining to this question?
2. The Council responded on 15 October 2010, supplying information by way of an email attachment, and subsequently in paper version when it became aware Mrs Miller could not open the attachment.
 3. On 27 October 2010, Mrs Miller wrote to the Council requesting a review of its decision. She disagreed with certain aspects of the response, while asserting that the request had not been responded to in full and that certain of the information provided was undecipherable and unintelligible.
 4. The Council notified Mrs Miller of the outcome of its review on 24 December 2010. It provided explanations in relation to certain of the information it had supplied, offering, in addition, to assist with any questions she had about the information she considered undecipherable and unintelligible. It considered that it had responded to all parts of her request. It referred to telephone conversations with Mrs Miller and noted arrangements made to allow her to inspect information held by the Transportation Service, due to the volume of the documentation in question.
 5. On 25 January 2011, Mrs Miller wrote to the Commissioner, stating that she was 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 Mrs Miller 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. On 25 February 2011, the investigating officer contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to provide details of the searches it had undertaken to ascertain what relevant information was held. It was also asked to consider whether the request should have been dealt with under the EIRs, and to provide comments in relation to any provisions of the EIRs it considered relevant to the request.
8. The Council provided a description of the searches it had undertaken to establish what information it held and which fell within the scope of Mrs Miller's request, together with other comments on the relevant records and background information on the request. It commented in detail on an opportunity to inspect information which had been arranged for Mrs Miller. The Council also acknowledged that the requested information was environmental information as defined in regulation 2(1) of the EIRs, confirming that it was relying upon the exemption in 39(2) of FOISA. It also advised that it had no intention to withhold information and therefore would not wish to rely on any exception under the EIRs.
9. The submissions received from both the Council and Mrs Miller, insofar as relevant, will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

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

Section 39(2) of FOISA – environmental information

11. The Commissioner set out his thinking on the relationship between FOISA and the EIRs in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland* and need not repeat it in full here. In this case, the Council submitted, in the course of the investigation, that it was entitled to withhold the requested information under section 39(2) of FOISA, acknowledging that it was environmental information as defined in regulation 2(1) of the EIRs.



12. The exemption in section 39(2) of FOISA provides, in effect, that environmental information as defined by regulation 2(1) of the EIRs is exempt from disclosure under FOISA, thereby allowing such information to be considered solely in terms of the EIRs. In this case, having considered the terms of Mrs Miller's request in the context in which it was made, and noting the Council's revised position on the information concerned, the Commissioner accepts that that the requested information falls within the definition of environmental information set out in regulation 2(1) of the EIRs, specifically paragraphs (a) and (c) of that definition. Consequently, he finds that the Council was entitled to apply the exemption in section 39(2) of FOISA to the requested information.
13. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also finds that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. The Commissioner has consequently proceeded to consider this case in what follows solely in terms of the EIRs.
14. However, while he is pleased to note that the Council accepted that the information was environmental in the course of the investigation, the Commissioner must also note that it did not do so (and act accordingly under the EIRs) when dealing with Mrs Miller's information request. As he found in *Decision 218/2007*, a Scottish public authority has an obligation to deal with a request for environmental information under the EIRs: in failing to do so, he finds that the Council failed to comply with regulation 5(1) of the EIRs.

Regulation 5(1) of the EIRs

15. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. It is important to bear in mind that this obligation relates only to information actually held by an authority when it receives the request. It is also important to bear in mind that the Commissioner can only consider what relevant information the authority held at that time, and not whether any information held was accurate.
16. Mrs Miller gave reasons for dissatisfaction in her application to the Commissioner, contending that not all of the information she had requested had been provided. She believed further relevant information to be held by the Council. Mrs Miller also contended that the Council had failed to respond to her request and request for review within the required timescales.



17. The Council described the context of Mrs Miller's request and the volume of material which required to be identified and collated in order to respond. The Council detailed the searches carried out with a view to identifying and locating the requested information, describing the files (in a number of services) and individual computer records searched. It also detailed the individual officers consulted in connection with the request. It described the steps it had taken to provide Mrs Miller with an opportunity to inspect certain information (see paragraphs 4 and 8 above), noting that an officer from its Transportation Service had been available to answer questions when Mrs Miller had taken up this opportunity.
18. As a result of the examination of the files on 8 December 2010, Mrs Miller was provided with information held by the Council's Transportation Service. Subsequently, on 1 February 2011, she was provided with further information held by the Council's Planning Service.
19. The Commissioner has considered carefully the terms of Mrs Miller's request, together with the submissions received from both her and the Council on the steps taken to respond. He has also noted the Council's submissions on its attempts to engage with Mrs Miller on this and related matters. He is not satisfied that Mrs Miller had been provided with a full response to her request by the time the Council notified her of the outcome of its review, and consequently finds that the Council failed to deal with her request in accordance with the requirements of regulation 5(1) of the EIRs.
20. In all the circumstances, however, having considered all relevant submissions, the Commissioner is satisfied that the Council has now taken adequate steps to identify, locate and make available all of the information held by it and requested by Mrs Miller.

Timescales for compliance

21. In her application to the Commissioner, Mrs Miller complained that the Council failed to respond to her request and request for review within the required periods of 20 working days.
22. Regulation 5(2)(a) of the EIRs requires a Scottish public authority to comply with its duty under regulation 5(1) (see above) as soon as possible and in any event no later than 20 working days after the date of receipt of the request. Regulation 16(4) gives authorities a maximum of 20 working days after the date of receipt of the applicant's representations to notify the applicant of its decision on review.
23. In this case, the Council responded to the original request (3 September 2010) on 15 October 2011, and to the request for review (27 October 2010) on 24 December 2010. In each case, therefore, it took longer than 20 working days to respond. Consequently, the Commissioner finds that the Council failed to comply with the requirements of regulation 5(2)(a) and 16(4) of the EIRs in dealing with Mrs Miller's request.



DECISION

The Commissioner finds that South Ayrshire Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mrs Miller. In particular, in failing to identify the information requested as environmental information (as defined in regulation 2(1) of the EIRs) and deal with the request accordingly under the EIRs, it failed to comply with regulation 5(1) of the EIRs. It also failed to comply with regulation 5(1) in failing to identify, locate and make available all of the information it held and which fell within the scope of Mrs Miller's request.

The Commissioner also finds that the Council failed to comply with Mrs Miller's request and request for review within the respective periods of 20 working days required by regulation 5(2)(a) and 16(4) of the EIRs.

Given that the Commissioner is now satisfied with the steps taken by the Council to identify, locate and make available all the relevant information it held at the time it received Mrs Miller's request, he does not require the Council to take any action in this case.

Appeal

Should either Mrs Miller 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
20 June 2011



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.

...

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;

...

(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.

(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.

...

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.