

Decision Notice

Decision 155/2015: Mrs Susan Murray and East Lothian Council

Application for High Hedge Notice

Reference No: 201501220

Decision Date: 6 October 2015



Scottish Information
Commissioner

Summary

On 2 April 2015, Mrs Murray asked East Lothian Council (the Council) for information relating to an application for a high hedge notice. The Council responded by providing some information, with personal data redacted. Following a review, Mrs Murray remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had partially failed to respond to Mrs Murray's request for information in accordance with FOISA and the EIRs. This was because the Council failed to disclose to Mrs Murray all the information it held that fell within her request. As the Council has now disclosed this information, the Commissioner does not require the Council to take any further action. The Commissioner is satisfied that all relevant information had been provided to Mrs Murray by the end of the investigation.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (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) (definitions (a), (c), and (f) of environmental information); 5(1) (Duty to make environmental information available on request)

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 2 April 2015, Mrs Murray made a request for information to the Council. She requested copies of all documents and related correspondence relating to her recent application for a high hedge notice which the Council had received and used to come to a decision on that application.
2. The Council responded on 28 April 2015 and provided information to Mrs Murray after redacting some personal data. The Council disclosed information in terms of FOISA and the EIRs.
3. On 29 April 2015, Mrs Murray wrote to the Council requesting a review of its decision as she believed that the Council had not supplied all information covered by her request. She had expected to receive all information, not simply information received by the Council, including (for example) internal documents relating to the high hedge notice that had been used to make the decision, or internal guidance, which had been referred to in some of the disclosed information.
4. The Council notified Mrs Murray of the outcome of its review on 6 May 2015. The Council dealt with the review in terms of FOISA and the EIRs. The Council provided a link to a report, which Mrs Murray had referred to, and which the Council said was available on its website¹.

¹ <http://pa.eastlothian.gov.uk/online-applications/applicationDetails.do?activeTab=documents&keyVal=NHR7DKGN03C00>

The Council stated that the report was “the total record of the formal decision making process” and that it held no further information. The Council explained that, in dealing with the application, Council staff had checked the planning files for the affected properties and this information could be made available to Mrs Murray, if she wished. The Council confirmed that it did not hold any further documents or records beyond those already provided to Mrs Murray, in relation to the decision on her application.

5. On 23 June 2015, Mrs Murray 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. Mrs Murray stated she was dissatisfied with the outcome of the Council’s review because she believed the Council held more information covered by her request.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mrs Murray 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.
7. 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 FOISA or the EIRs it considered applicable to the information requested.
8. During the investigation, the Council located more information which fell within Mrs Murray’s request and, on 25 September 2015, the Council disclosed that information to Mrs Murray. That is, the Council provided a link to a report on its website² regarding the implementation of the High Hedges Act (Scotland) Act 2013 a High Hedges Flowchart; and 25 photographs taken during a site visit.

Commissioner’s analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all the relevant submissions, or parts of submissions, made to her by both Mrs Murray and the Council. She is satisfied that no matter of relevance has been overlooked.

Application of FOISA and the EIRs

10. The Council responded to Mrs Murray in terms of both FOISA and the EIRs – that is, it disclosed information to Mrs Murray under the EIRs and FOISA.
11. “Environmental information” is defined in regulation 2(1) of the EIRs (paragraphs (a), (c) and (f) of the definition are reproduced in full in Appendix 1 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 various qualifications and exceptions contained in the EIRs.
12. The Commissioner has considered the information requested by Mrs Murray in the context of the definition of “environmental information” in regulation 2(1) of the EIRs. The Commissioner is satisfied that the information requested, which relates to an application in respect of the

² http://www.eastlothian.gov.uk/meetings/meeting/5487/members_library_service (item 85/14)

High Hedges (Scotland) Act 2013, would fall within the definition in paragraphs (a), (c) and (f) of regulation 2(1) of the EIRs.

13. 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 any such information to be considered solely in terms of the EIRs. In this case, the Commissioner is of the view that the Council could have applied the exemption in section 39(2) to at least some of the information disclosed, given her conclusion that some of the information is environmental information. However, the Council did not choose to rely upon section 39(2) of FOISA when responding to Mrs Murray's request, or in its submissions to the Commissioner.
14. As the Council has not relied upon the exemption in section 39(2) of FOISA, the Commissioner is required to consider the Council's handling of the request in terms of both FOISA and the EIRs. In essence, Mrs Murray's dissatisfaction is whether all relevant information was identified and provided by the Council. The Commissioner will therefore consider Mrs Murray's dissatisfaction in terms of whether the Council complied with section 1(1) of FOISA and regulation 5(1) of the EIRs.
15. As Mrs Murray did not challenge the Council's decision to withhold personal data in the information disclosed to her, the Commissioner will not consider whether the Council was correct to withhold this information. Also, as Mrs Murray did not express dissatisfaction with the various links to its website the Council provided in response to her request, the Commissioner will not consider whether the provision of such links complied with FOISA or the EIRs.

Section 1(1) of FOISA and regulation 5(1) of the EIRs

16. Section 1(1) of FOISA creates a general entitlement to be given information held by a Scottish public authority, subject to the application of any exemptions in Part 2 of FOISA and any other relevant provision in Part 1.
17. 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. This obligation relates to the information held by an authority when it receives a request. Again, this requirement is subject to the exceptions and other relevant provisions in the EIRs.
18. In her application to the Commissioner, Mrs Murray explained why she believed that more information might be held by the Council. She questioned how the Council could evidence its decision in her high hedge application, or be accountable for its decision, if it did not hold such information. She commented that the Council's separate reference to internal guidance relating to high hedge applications suggested more information was held. She referred to a specific issue regarding the number of tree trunks involved, which she believed Council officials would have photographed during their visit. Finally, she believed that the Council should be able to provide a formal record of certain site visits, including measurements taken on those visits.
19. During the Commissioner's investigation, the Council located photographs, which it provided to Mrs Murray. The Council also provided a "high hedges flowchart" and a link to a relevant report on the Council's website.
20. On receiving the photographs during the investigation, Mrs Murray voiced suspicion about the Council's previous responses and asked how she could be sure that she had now

received all the information when the Council had previously told her that it had located all the information she had requested.

21. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. The same standard is applied in respect of both FOISA and the EIRs. In determining whether a Scottish public authority holds information, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. She will also consider, where appropriate, any reason offered by the public authority to explain why it does not hold the information.
22. Identification of information relating to Mrs Murray's high hedge notice application, should, in the Commissioner's view, not have been too difficult for the Council.
23. As noted above, Mrs Murray identified three types of information which she believed the Council should hold and which it should have provided when responding to her request: photographs; internal guidance; and a formal record of site visits.

Photographs

24. In relation to photographs, the Council explained to the Commissioner that the first visit to Mrs Murray's house had been in connection with a complaint she had made to the Council's Antisocial Behaviour Team. Photographs were taken during this visit (the "pre-application visit"). After an attempt at mediation had failed, the process for a high hedge notice application began. The Council explained that these were two entirely separate, non-related procedures undertaken by two different Council departments. During this process, a site visit was made on 20 February 2015 and photographs were taken of the individual trunks of six trees.
25. The Council stated that the photographs taken during the initial pre-application visit did not relate to the High Hedge Application and thus were not supplied to Mrs Murray in response to her request. The Council explained that such photographs would only be used to "dissuade" an application if it was obvious that such photographs confirmed that high hedge legislation did not apply. The Council confirmed that the first set of photographs, from the pre-application visit, did not influence the decision on Mrs Murray's high hedge notice application in any way. (The Council has now provided Mrs Murray with these photographs.)
26. The Council stated that it provided Mrs Murray with some of the disclosed information as a courtesy, as the information related to the pre-application stage and was technically outwith the scope of the request for information relating to the decision on the high hedge notice application. The Commissioner accepts that the photographs from the initial pre-application visit are not information which falls within the scope of Mrs Murray's request, and that the Council was not required to provide this information when responding to that request. However, it would have been helpful for the Council to explain to Mrs Murray that (in terms of the information covered by her request) it was making a distinction between information relating to processes preceding her application for a high hedge notice, and information relating directly to the high hedge application. This would have enabled her to make a request for all information relating to the pre-application visits, if she had wished to do so.
27. The Council has acknowledged that the photographs taken on 20 February 2015 were used in the determination that the individually planted trees did not constitute a hedge in terms of the High Hedges (Scotland) Act 2013. These photographs therefore represented information covered by the terms of Mrs Murray's request. The Council provided these photographs to Mrs Murray during the investigation. The Commissioner finds that in failing to provide this

information in response to Mrs Murray's request, the Council failed to comply with section 1(1) of FOISA and regulation 5(1) of the EIRs.

Internal guidance

28. Mrs Murray noted that a Council letter (dated 27 May 2015) referred to "internal guidance" relating to high hedge applications. She expected the Council to have suitable internal guidance such as a manual which simplified the legislation into more user-friendly desk instructions, to ensure the correct processes were followed and to ensure consistency and compliance with the legislation.
29. On 16 September 2014, the Council confirmed to the Commissioner that it has no internal written guidance for its officers regarding the decision-making process for high hedge applications. It stated that the reference to "internal guidance" was a reference to the Council's own guidance notes as taken from the Scottish Government's legislation and published on the Council's website and also internally for both Council officers and the public to use.
30. The Council identified two other documents relating to guidance on high hedge applications: a report to Council members on the Implementation of the High Hedges (Scotland) Act 2013, which is available on the Council's website, and a flow chart relating to high hedge applications. Both documents were provided to Mrs Murray during the investigation.
31. The flow chart (provided by the Council to Mrs Murray on 24 September 2015) was described by Mrs Murray, on receiving it, as not detailing the actions to be taken when a decision is being made on a high hedge application. Mrs Murray commented that the flow chart only showed the actions to be undertaken before an application was submitted (negotiation and mediation) and that an application should be submitted to the Development Manager, and a decision made and issued by them. Mrs Murray did not think it showed the 'facts' considered or the evidence upon which the decision on her case was based.
32. In respect of the newly-disclosed web link to a report regarding the implementation of the High Hedges Act (Scotland) Act 2013 (item 85/14)³, Mrs Murray said that this forms part of the guidance already available online at the Council's website (that is, *Development Management – Application Forms and Guidance Notes, Guidance Notes High Hedges*)⁴. Mrs Murray commented that this is not new, separate guidance.
33. While the Commissioner accepts that these two documents relate to the process of considering high hedge notice applications, she has concluded that this information was not covered by the terms of Mrs Murray's request, as there is no evidence that the Council used the information to reach a determination on Mrs Murray's application.
34. The Commissioner accepts that the Council does not have any other information which could be described as "internal guidance" in relation to high hedge applications.

Site visit records

35. Mrs Murray also expected the Council to hold a formal record of certain site visits. She said that without such information it would be difficult for the Council to evidence its decision on her high hedge application. She said that she would expect to find a record of the number of

³ http://www.eastlothian.gov.uk/meetings/meeting/5487/members_library_service

⁴ http://www.eastlothian.gov.uk/downloads/file/8099/scottish_government_guidance_notes-high_hedges

trees counted, photographs, measurements taken: i.e. details of the evidence used to come to their decision.

36. On 29 September 2015, the Council confirmed to the Commissioner that it did not hold any such information. The Council officer stated that there were no formal notes/records relating to the issues raised by Mrs Murray other than findings from site inspection as presented within the Officers Report attached to file with the specific reference 15/00001/HHN⁵.
37. On the basis of the evidence in submissions and correspondence from the Council, the Commissioner accepts that the Council does not hold any further information relating to site visits other than the information already available to Mrs Murray.

Whether all relevant information identified

38. Having considered all relevant submissions and the terms of the request, the Commissioner accepts that (by the close of the investigation) the Council had carried out adequate searches to ascertain what information it held which was covered by the terms of Mrs Murray's request. She is satisfied that all information located during the investigation has now been provided to Mrs Murray. As noted, the failure to provide this information when responding to Mrs Murray's request represents a failure to comply fully with section 1(1) of FOISA or regulation 5(1) of the EIRs.
39. The Council has indicated to the Commissioner that it takes seriously its failure to identify and locate all the requested information, and has apologised. The Council explained that it would deliver specific training to ensure that this does not occur again. The Commissioner acknowledges this and requires no additional action from the Council in respect of its failure to identify all information covered by Mrs Murray's request.
40. As stated in previous decisions, the Commissioner cannot consider whether the Council should hold more recorded information on a subject: the Commissioner can only consider whether the Council complied with Part 1 of FOISA or the EIRs in responding to Mrs Murray's request. Similarly, the Commissioner cannot investigate or comment on matters which are outwith her remit and this means she is not able to investigate, or comment on, how the Council addressed Mrs Murray's application in respect of a high hedge or any subsequent complaint she has made about this application.

⁵ http://pa.eastlothian.gov.uk/online-applications/files/19EB1AACF8F4CE27E1097D6BDA8001D3/pdf/15_00001_HHN-OFFICER-2228067.pdf

Decision

The Commissioner finds that East Lothian Council (the Council) failed to comply in full with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mrs Murray.

The Commissioner finds that by initially failing to provide all of the information falling within the scope of the request, the Council failed to comply fully with section 1(1) of FOISA and regulation 5(1) of the EIRs. As the Council has now disclosed all relevant information to Mrs Murray, the Commissioner does not require the Council to take any action in respect of this failure in response to Mrs Murray's application.

Appeal

Should either Mrs Murray 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

6 October 2015

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 –

...

"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;

...

(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);

...

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.

...

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