

Decision Notice

Decision 175/2017: Mr David Telford and North Ayrshire Council

Calculation of development income

Reference No: 201701118

Decision Date: 17 October 2017



Scottish Information
Commissioner

Summary

The Council was asked for information explaining the calculation of figures contained in planning documentation for a housing development being built in Fairlie.

The Council considered the request under the EIRs, concluding that it did not hold the information requested. Following investigation, the Commissioner accepted this.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a), (c) and (f) of definition of “environmental information”); 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)

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 6 December 2016, Mr Telford made a request for information to North Ayrshire Council (the Council) in relation to a private housing development being built in Fairlie, as follows:

Please provide the information which explains in detail the calculation of the developer’s return as 10.79% of income.

This information is required as 10.79% of development income equates to 13.6% of development costs or true profit. This would appear to be a clear breach of North Ayrshire Council’s Policy RES3 which requires that the Developer’s reasonable profit should not exceed 12%.

Using the cost plan details contained within North Ayrshire Council’s Planning Documentation, the foregoing suggests that a sum of £246,107 will be passed to the contractor/developer and that this important sum should properly and correctly be due as a proportion of the substantial community benefit described in Policy RES3.

2. The Council responded on 9 December 2016, having considered the request under the EIRs. It informed Mr Telford that it considered the request to be manifestly unreasonable in terms of regulation 10(4)(b) of the EIRs, concluding – on balance – that the public interest favoured refusing to make the information available.
3. On 12 December 2016, Mr Telford wrote to the Council, requesting a review of its decision on the basis that he did not agree that regulation 10(4)(b) applied. The Council notified Mr Telford of the outcome of its review on 6 January 2017, upholding its original decision without modification.
4. On 10 January 2017, Mr Telford wrote to the Commissioner, applying for a decision as he was dissatisfied with the outcome of the Council’s review. The Commissioner investigated,

and subsequently issued *Decision 072/2017 Mr David Telford and North Ayrshire Council*¹ finding that the Council was not entitled to deal with Mr Telford's request as manifestly unreasonable. The Commissioner required the Council to provide Mr Telford with a revised review outcome, otherwise than in terms of regulation 10(4)(b) of the EIRs.

5. The Council provided Mr Telford with a revised review outcome on 23 June 2017. It informed Mr Telford that, in terms of regulation 10(4)(a) of the EIRs, it held no information falling within the scope of his request. While the Council appreciated that Mr Telford believed the Council should hold the information, it confirmed it did not.
6. On 24 June 2017, Mr Telford wrote to the Commissioner's office, applying 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 Telford stated he was dissatisfied with the Council's revised review outcome. He did not accept that the Council held no information relating to the calculation that arrived at the percentage of 10.79% of development income, as opposed to 12% true profit. To support his argument, Mr Telford stated that the percentage of 10.79% was contained in the Section 75 Agreement between the Council and the developer, signed and lodged with the Registers of Scotland prior to the date of his information request.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr Telford 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.
8. On 19 July 2017, the Council was notified in writing that Mr Telford had made a valid application and the case was subsequently allocated to an investigating officer.
9. 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. These focussed on the searches carried out to identify and locate any information held by the Council that fell within the scope of Mr Telford's request.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all of the relevant submissions, or parts of submissions, made to him by both Mr Telford and the Council. He is satisfied that no matter of relevance has been overlooked.

Background to request

11. As rehearsed in *Decision 003/2017 Mr David Telford and North Ayrshire Council*², Policy RES3 forms part of the Council's Local Development Plan³. It is a site-specific policy for Kelburn Castle, Fairlie, providing for a housing development and subsequent programme

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201700056.aspx>

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201601710.aspx>

³ <http://www.north-ayrshire.gov.uk/resident/planning-and-building-standards/local-development-plan.aspx>

of restoration and maintenance for Kelburn Castle and improvements to the Country Centre there.

12. Criterion 2 of Policy RES3 requires the submission of a detailed, fully verifiable, financial and business plan for the overall development, showing that all funds raised from the sale and development (except a reasonable developer's profit, as detailed in Criterion 6) are to be channelled into the conservation and subsequent maintenance of Kelburn Castle and the enhancement of Kelburn Country Centre, to secure their ongoing use.
13. Criterion 6 of Policy RES3 requires open book accounting on both land and development sales, which would allow for a reasonable developer's profit only (indicatively 12%, as advised by Historic Scotland) with all other proceeds being channelled to the development to be enabled (i.e. the works outlined in the previous paragraph).
14. Policy RES3 also provides that any permitted development is subject to an appropriate Section 75 Agreement, to ensure that monies are only used for the works to Kelburn Castle and the Country Centre described above.

Application of the EIRs

15. It is clear from the Council's correspondence with both Mr Telford and the Commissioner that any information falling within the scope of this request would be environmental information, as defined in regulation 2(1) of the EIRs. Mr Telford has asked for information relating to calculations underpinning the permitted developer's return for a proposed housing development. As such, the Commissioner is satisfied that it would fall within paragraphs (a), (c) and (f) of the definition of environmental information (reproduced in Appendix 1).
16. Mr Telford has not disputed the Council's decision to handle the request under the EIRs (and indeed the Commissioner reached the same conclusion in Decisions 003/2017 and 072/2017). Accordingly, the Commissioner will consider the information in what follows solely in terms of the EIRs.

Regulation 5(1)

17. Regulation 5(1) of the EIRs, subject to the various qualifications contained in regulations 6 to 12 (regulation 5(2)(b)), requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
18. A Scottish public authority applying any of the exceptions under regulation 10 of the EIRs must interpret them in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
19. In this case, the Council confirmed to the Commissioner that it wished to rely upon the exception in regulation 10(4)(a) of the EIRs for the information sought in Mr Telford's request.

Regulation 10(4)(a)

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 the applicant's request is received.
21. The standard of proof in considering whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will

consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held. While it may be relevant as part of this exercise to explore what information should be held, ultimately the Commissioner's role is to determine what relevant information is (or was, at the time the request was received) held by the public authority.

The Council's submissions

22. In its submissions to the Commissioner, the Council explained it had been corresponding with Mr Telford for over 10 years on matters concerning the housing development in Fairlie, the corresponding planning policy and the Section 75 Agreement. The Council submitted that over this period, it had provided Mr Telford with copies of all documents relating to these matters, many of which were already in the public domain on the Council's planning portal.
23. The Council's position was that it had provided all relevant records to Mr Telford and held no additional information in recorded form relating to these matters. The Council confirmed it was happy to disclose any further relevant information produced in the future, as it had already done in recent months. The Council affirmed, however, that it was not prepared to create new information in response to freedom of information requests (as, indeed, it is not required to do).
24. The Council explained that much of the information held on the percentage allowable within the cost plan was publicly available, contained in the planning permission, associated planning documentation and the Section 75 Agreement.
25. The Council explained that a Section 75 Agreement can only be drafted once consent to the planning application has been granted. Normally, consent is granted subject to a Section 75 Agreement and the conditions for the Agreement are stipulated within the consent. In this case, a developer's return of 10.79%, for the purposes of Policy RES3, was offered to the Planning Committee by the developer. As this was less than the 12% recommended by Historic Scotland as set out in Policy RES3, the Planning Committee took the decision to accept that percentage, and consent was granted. The 10.79% was therefore agreed before the Section 75 Agreement was instructed by the Committee. The Council submitted that this was a public process.
26. The Council provided the Commissioner with copies of documents already disclosed to Mr Telford, namely:
 - the Council's response of 30 August 2013 to a complaint by Mr Telford on the whole application, which made reference to the profit margin being reduced to 10.79%.
 - email exchanges within the Council and with the developer about the cost plans (the majority of which post-dated Mr Telford's request), disclosed to him on 21 February 2017 and again on 6 July 2017.

The Council explained that while these communications did not specifically relate to the calculation of the 10.79% figure, they represented the only information held concerning the matter.

27. The Council explained that the only obligation in the Section 75 Agreement is for the developer to submit (to the Council) cost plans in the form of the template agreed therein, together with an auditor's certificate for review six months after the commencement of the development and every six months thereafter. The Council informed the Commissioner that

the emails relating to this (referenced above) had already been disclosed to Mr Telford. The Council confirmed it was unable to provide any further information regarding the profit margin, and held no other recorded information on this matter.

28. In correspondence with the investigating officer, Mr Telford had submitted arguments to support his position that the figure of 10.79% was not in keeping with the way in which profit would normally be calculated. Mr Telford argued that it was not possible to take an arbitrary percentage of the sale price of a house and declare such a sum as true profit. In his view, actual profit could only accrue by deducting the true cost of building the house from the sale price obtained, with the resulting figure being used over the building cost to calculate the true percentage profit. The Council was given an opportunity to comment on this.
29. In response, the Council informed the Commissioner that it did not intend to comment. It confirmed that it was not prepared to create any new documentation for Mr Telford as this would be contrary to Mr Telford being subject to its Unacceptable Contact Policy.

Searches

30. The Council described the searches carried out to identify whether it held any information specific to Mr Telford's request, explaining that colleagues within its Planning and Legal Services were consulted, given that these departments were involved in the planning application and subsequent Section 75 Agreement. Colleagues in its Property Management and Infrastructure Service were also consulted, given their subsequent involvement with the cost plans submitted to the Council.
31. The Council explained that its searches encompassed both electronic and paper files, covering Policies RES3 and RES2B, Dawn Homes, Ladies Walk, the Section 75 Agreement and planning permissions. The time frame applied to the searches was from the date planning permission was granted in 2013 to the date of Mr Telford's request.
32. Within the Planning Service, a search of the IDOX file for planning reference 12/00159/PPM was carried out. As the planning file contained all information submitted in relation to the planning application and the Section 75 Agreement, including general correspondence, PDFs, drawings and word documents, this was the basis for the Council's search. The Council submitted that the majority of this information was publicly available online and the remainder, relevant to this request, had already been disclosed to Mr Telford (redacted where necessary).
33. The Council explained its Legal Service held two paper files – one containing instructions about the Section 75 Agreement and one containing advice in connection with the application and interpretation of Policy RES2B (which became Policy RES3). Manual searches of both files were carried out, covering the period from 2008 to 2015 and 2017 respectively.
34. The Council explained that a search of its email system had been carried out, which identified the emails already disclosed to Mr Telford (referenced above).
35. The Council considered its searches were both relevant and sufficient. Confirming it had searched the entire contents of the files relating to the negotiation and conclusion of the Section 75 Agreement, it submitted that all relevant information had already been disclosed to Mr Telford.
36. In conclusion, the Council's position was that it held no information falling within the scope of Mr Telford's request which explained, in detail, the calculation of the developer's return as 10.79% of development income.

Commissioner's views

37. Having considered all the relevant submissions and the terms of the request, the Commissioner is satisfied that the Council took adequate, proportionate steps to establish whether it held any information falling within the scope of Mr Telford's request. He accepts that any information relevant to the request would have been identified using the searches described by the Council.
38. The Commissioner can only consider what information is actually held by the Council, and not information it should hold, or what an applicant believes it should hold. It is not for the Commissioner to consider whether the Council followed the correct processes in relation to the calculation of the profit figure. Bearing that in mind, the Commissioner is satisfied, on the balance of probabilities, that the Council does not (and did not, on receiving the request), hold any of the information requested by Mr Telford, in addition to any relevant information in what had been disclosed to him already.

The public interest

39. The exception in regulation 10(4)(a) of the EIRs is subject to the public interest test in regulation 10(1)(b) of the EIRs and so can only apply if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in making the information available. In this case, for the reasons set out above, the Commissioner is satisfied that the Council does not (and did not, on receiving the request) hold any information covered by Mr Telford's request. Consequently, he accepts that there is no conceivable public interest in requiring the disclosure of such information and finds that the public interest in making information available is outweighed by that in maintaining the exception.

Commissioner's conclusions

40. The Commissioner concludes that the Council was entitled to apply regulation 10(4)(a) of the EIRs in this case.

Decision

The Commissioner finds that North Ayrshire Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mr Telford.

Appeal

Should either Mr Telford or North Ayrshire 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

17 October 2017

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.

(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;

...

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