

Decision Notice



Decision 179/2012 Ms Elizabeth W Bell Horsburgh and the City of Edinburgh Council

Information relating to a statutory repair notice

Reference No: 201200088
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Rosemary Agnew
Scottish Information Commissioner

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Summary

Ms Horsburgh asked the City of Edinburgh Council (the Council) for information relating to specified repairs carried out under statutory notice. The Council failed to respond to this request within 20 working days and Ms Horsburgh requested a review. The Council responded by disclosing some information to Ms Horsburgh, but withheld other information on the basis that disclosure would undermine ongoing investigations into the handling of statutory repair notices.

During the investigation, the Council disclosed the withheld information to Ms Horsburgh and also identified and disclosed further information falling within the scope of her request. Having considered the Council's submissions in this case the Commissioner did not accept that the Council had been entitled to withhold the information under the exceptions cited when first dealing with Ms Horsburgh's request. In doing so, and in failing to identify all information covered by Ms Horsburgh's request, the Council had failed to comply with regulation 5(1) of the EIRs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(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) and (c) of "environmental information"); 5(1) and (2)(a) and (b) (Duty to make available environmental information on request); 10(1), (2), (4)(e) and (5)(b) (Exceptions from duty to make environmental 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.

Background

1. On 20 September 2011, Ms Horsburgh wrote to the Council to complain about the time taken to resolve a dispute between the contractors Ryden and A Thorburn Ltd regarding work carried out under a statutory notice. Ms Horsburgh asked for information about the steps taken by the Council to resolve this issue, along with details of the billing costs claimed by the two contractors, and details of a report that one of the contractors had previously claimed to be preparing.



2. The Council responded to this letter in general terms on 21 September 2011, but did not include a response to the requests for information.
3. On 28 September 2011, Ms Horsburgh wrote to the Council again asking for the following information:
 - a. All correspondence between Council Officers, Ryden, and A Thorburn Ltd in relation to the statutory notice work on a specified address; and
 - b. All documentation held by the Council relating to the issuing of the statutory notices listed above.
4. The Council failed to respond to this request within 20 working days. On 18 November 2011, Ms Horsburgh wrote to the Council requesting a review of its decision not to respond to her request.
5. On 19 November 2011, Ms Horsburgh received a late response to her initial information request. In this response (dated 16 November 2011), the Council provided Ms Horsburgh with some information, but advised her that other information she had requested was excepted from disclosure under regulations 10(4)(e) and 10(5)(b) and regulations 11(1) and (2) of the EIRs.
6. The Council later reviewed its response to Ms Horsburgh's request, and notified Ms Horsburgh of the outcome of its review on 19 December 2011. In this letter, the Council apologised for its failure in responding to Ms Horsburgh's initial request in line with the timescales set out in the legislation. The Council did not suggest any other changes to its response of 16 November 2011.
7. On 11 January 2012, Ms Horsburgh 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.
8. The application was validated by establishing that Ms Horsburgh 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.

Investigation

9. On 7 February 2012, the Council was notified in writing that an application had been received from Ms Horsburgh, and was asked to provide the Commissioner with any information withheld from her. The Council responded with the information requested and the case was then allocated to an investigating officer.



10. The investigating officer subsequently 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.
11. The Council was questioned about the exceptions it was relying upon to withhold the requested information, namely those contained in regulations 10(4)(e), 10(5)(b) and 11(2) of the EIRs.
12. The Council did not immediately respond to this letter but, on 28 May 2012, it informed Ms Horsburgh that it had reconsidered her request, and provided the information previously withheld in terms of regulations 10(4)(e) and 10(5)(b), after redacting personal data in terms of regulation 11(2) of the EIRs. Ms Horsburgh has confirmed that she accepts the redactions of personal data; consequently, this information will not be considered further in this decision. However, Ms Horsburgh believed that the Council should hold more information than had been provided, particularly in relation to costs.
13. The Council was asked to respond to further questions, and in particular to explain the steps it had taken to identify and locate the information Ms Horsburgh had requested. The Council identified further information of relevance to Ms Horsburgh's request (which it subsequently disclosed to Ms Horsburgh) and provided submissions on its application of the EIRs in this case. In total, after its initial disclosure to Ms Horsburgh on 28 May 2012, the Council also identified and released information to Ms Horsburgh on 31 July 2012 and 3 October 2012.
14. The relevant submissions received from both the Council and Ms Horsburgh will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

15. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Ms Horsburgh and the Council and is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

16. It is clear from the Council's correspondence with both Ms Horsburgh and the Commissioner that it considered the information requested was environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns significant external repairs to buildings and the Commissioner is satisfied that it falls within either paragraph (a) or paragraph (c) of the definition of environmental information contained in regulation 2(1) of the EIRs, being information on the state of the elements of the environment, or on measures and activities affecting or likely to affect the state of those elements.



Section 39(2) of FOISA – environmental information

17. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1)) 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 accepts that the Council was entitled to apply the exemption to the withheld information, given her conclusion that it is properly classified as environmental information.
18. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exemption and in dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.

Regulation 5(1) of the EIRs

19. 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. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold, but which is not in fact held.
20. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

Adequacy of searches

21. In this case, in response to her initial request and request for review, the Council advised Ms Horsburgh that it was withholding much of the information she had requested under the exceptions in regulations 10(4)(e) and 10(5)(b) of the EIRs. When, during the investigation, the Council decided to withdraw its reliance upon the exceptions it had claimed and disclosed information to Ms Horsburgh, she noticed that the information disclosed to her was not complete.
22. In particular, Ms Horsburgh noted that, while she had been provided with email correspondence, the documents that were listed as attachments to these emails were missing. Ms Horsburgh also stated that she did not believe that all of the information relating to her request had been released to her. Ms Horsburgh had not received any information regarding the tender specification or criteria showing what the contractors were being asked to tender for. Ms Horsburgh also noted that there were large gaps in the correspondence that had been provided to her (e.g. no correspondence dated between March and May 2012, and then nothing from May 2010 until August 2010).



23. Ms Horsburgh's concerns about the completeness of the disclosed information were raised with the Council, which was asked to provide further details of the searches it had undertaken in this case. The Commissioner notes that, on receipt of these queries, the Council located and disclosed additional information comprising some 100 pages to Ms Horsburgh. When providing this additional information to Ms Horsburgh, the Council submitted it had searched all of its hardcopy and electronic files on two occasions and that all of the available information has been provided to the applicant. In later correspondence, the Council located and disclosed to Ms Horsburgh one further document.
24. The Council has provided the Commissioner with evidence that it undertook searches in response to the initial request and request for review, but, given the number of documents that were later retrieved, it is clear that these searches were not sufficiently thorough to locate all of the information requested by Ms Horsburgh. The Commissioner understands that, at the time that Ms Horsburgh's request was received, the Council had received a high volume of information requests and resources were stretched. Nevertheless, the Commissioner would expect the Council to ensure that any searches undertaken to identify information relevant to an information request are thorough.
25. The Commissioner is satisfied that the Council has now identified and disclosed all relevant information to Ms Horsburgh. However, the Commissioner is concerned that only part of this information was identified at the initial point of disclosure and that it took additional prompting before the Council managed to locate and disclose a further 100 pages of relevant information. In failing to identify and provide this information at the time of Ms Horsburgh's request, the Council failed to comply with regulation 5(1) of the EIRs.
26. Although the Commissioner is now satisfied that the Council has located and disclosed all relevant information to Ms Horsburgh, she has considered whether the Council complied with the EIRs in initially withholding some information under regulations 10(5)(b) and 10(4)(e).

Regulation 10(5)(b) of the EIRs

27. Regulation 10(5)(b) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature.
28. In its response to her request (upheld in its review outcome), the Council informed Ms Horsburgh that it was withholding the requested information because there was an ongoing investigation into the handling of statutory repair notices. In the circumstances, it believed that the release of the information might prejudice substantially the outcome of such investigations, especially if criminal prosecutions were to arise. The Council considered that the public interest was better served by ensuring that the investigation was not prejudiced by releasing potential evidence into the public domain.
29. As indicated above, during the investigation, the Council disclosed all of the information it had previously withheld under regulation 10(5)(b), subject to the redaction of personal data.



30. At no stage during the investigation did the Council explain to the Commissioner why it considered that the information it had previously been withholding under regulation 10(5)(b) of the EIRs was no longer covered by that exception: i.e. whether a change in circumstances meant that the exception no longer applied; whether a change in circumstances had tipped the balance of public interest towards disclosure; or whether the Council had decided that the exception had been wrongly applied in the first place. In the circumstances, the Commissioner can only conclude that (in this particular case) the Council was not entitled to withhold the information under regulation 10(5)(b) and in doing so failed to comply with regulation 5(1) of FOISA.

Regulation 10(4)(e) of the EIRs

31. Under regulation 10(4)(e) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request involves making available internal communications. For information to fall within the scope of the exception in regulation 10(4)(e), it need only be established that the information is an internal communication. The regulation does not expand upon what is meant by internal communications. However, it will not usually cover correspondence between a Scottish public authority and a third party such as a contractor. If the Commissioner finds that the exception is engaged, she must then go on to consider whether, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
32. As indicated above, during the investigation, the Council disclosed all of the information it held falling within the scope of Ms Horsburgh's request, subject to the redaction of personal data.
33. At no stage during the investigation did the Council explain to the Commissioner why it considered that the information it had previously been withholding under regulation 10(4)(e) of the EIRs was no longer covered by that exception: i.e. whether the Council had concluded that the exception was not engaged, or whether the public interest now lay in disclosure. In the circumstances, the Commissioner can only conclude that (in this particular case) the Council was not entitled to withhold the information under regulation 10(4)(e) and in doing so failed to comply with regulation 5(1) of FOISA.

Regulation 5(2)(a) of the EIRs – timescales for response

34. Regulation 5(2)(a) of the EIRs specifies that the duty to provide information in response to a request should 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 (subject to regulations 6 to 12 of the EIRs).
35. The Council did not provide a response to Ms Horsburgh's request dated 28 September 2011 until 16 November 2011 (received by Ms Horsburgh on 19 November 2011). Ms Horsburgh expressed dissatisfaction about the delay in responding to her request.
36. In its submissions, the Council acknowledged that it had failed to provide a response to Ms Horsburgh within the required timescale. It advised that this was due to the high volume of requests for information about statutory notices.

Decision 179/2012
Ms Elizabeth W Bell Horsburgh
and the City of Edinburgh Council



37. While accepting that the Council has been dealing with a high volume of complex cases recently, the Commissioner must emphasise the importance of public authorities prioritising their workloads to ensure compliance with the mandatory timescales in answering information requests. In the circumstances, the Commissioner must conclude that the Council breached the timescales set out in regulation 5(2)(a) of the EIRs.

DECISION

The Commissioner finds that the City of Edinburgh Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Ms Horsburgh.

The Commissioner finds that the Council was not entitled to withhold the information requested by Ms Horsburgh on the basis of the exceptions in regulation 10(5)(b) and 10(4)(e) of the EIRs. By failing to provide Ms Horsburgh with that information, and other information falling within the scope of her request, the Council breached regulation 5(1). The Council also failed to provide a response with the time period laid down in regulation 5(2)(a) of the EIRs.

Given that the Council disclosed the withheld information during the investigation and took steps to identify and provide all other information covered by Ms Horsburgh's request, the Commissioner does not require it to take any further action.

Appeal

Should either Ms Horsburgh or the City of Edinburgh 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
2 November 2012



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.

...

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
- ...
- (e) the request involves making available internal communications.
- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-
- ...
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of any public authority to conduct an inquiry of a criminal or disciplinary nature;
- ...