

Decision Notice

Decision 193/2017: Mr Gordon Hodge and Dumfries and Galloway Council

Flood prevention scheme

Reference No: 201701286

Decision Date: 21 November 2017



Scottish Information
Commissioner

Summary

The Council was asked for information relating to the Whitesands Flood Prevention Scheme. The Council disclosed the information that it held, stating other information was readily available online. An application was made to the Commissioner, questioning whether the Council held more information. While the Commissioner found that the Council should have considered the request under the EIRs, he was satisfied that the Council had carried out appropriate searches and disclosed all the information it held.

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) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) (Duty to make available environmental information 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 15 February 2017, Mr Hodge wrote to Dumfries and Galloway Council (the Council) in connection with the Whitesands Flood Prevention Scheme and requested information in 12 parts. This included the following:
 - a) Will the scheme increase the pre scheme flood levels in the Nunholm area on a 1 in 25 years, 1 in 75 years and a 1 in 200 years return period and if so by how much on each of these return periods? To assist in making a comparison, Mr Hodge suggested, it might be useful to give this data at the Nunholm key locations given in Table 3.5 of the JE Jacobs report referred to elsewhere in his request.
 - b) What area and volume of silt build up will be removed to keep the flood levels upstream of the scheme as referred to 7.1.5 in the Supporting Document Operational and Maintenance Arrangements at pre scheme flood levels?
 - c) If the above silt and other debris build up were not to be removed when the scheme is in service how will this affect the predicted flood levels in the Nunholm area on a 1 in 25 years, 1 in 75 years and a 1 in 200 years return period at the key locations referred to above in question [a])?
2. The Council responded on 3 March 2017, advising Mr Hodge that the information sought in the above parts of his request was publicly available in the Hydraulic Model Report (HMR), available online.
3. On 6 March 2017, Mr Hodge wrote to the Council requesting a review of its decision. He did not believe the Council had provided all the information he requested and, in relation to the

requests under consideration here, did not consider it possible for a lay person to extract the information from the HMR.

4. On 9 March 2017, the Council wrote to Mr Hodge and acknowledged his requirement for review. It suggested that a review outcome would not provide the advice and assistance he was seeking, as the explanations he sought were more technical than could be expected from reasonable advice and assistance. It advised that the Council was not obliged to provide legal and technical advice or assistance in respect of information that had been published. It suggested that he may wish to seek independent professional advice and asked for confirmation that he still required a review.
5. On 14 March 2017, Mr Hodge confirmed that he wished the Council to review its original decision, including its response to the requests outlined above.
6. The Council notified Mr Hodge of the outcome of its review on 4 April 2017. It informed Mr Hodge that some of the information requested was within appendix D of the HMR and provided Mr Hodge with a copy. The Council confirmed, in accordance with section 17(1) of FOISA, that it did not hold information for the 1 in 25 and 1 in 200 year return periods.
7. On 24 July 2017, Mr Hodge wrote to the Commissioner. He 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. Mr Hodge stated he was dissatisfied with the outcome of the Council's review because he was not satisfied that the Council had provided him with all of the information it held for the questions set out above.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mr Hodge made requests for information to a Scottish public authority and asked the authority to review its response to those requests before applying for a decision.
9. On 6 September 2017, the Council was notified in writing that Mr Hodge had made a valid application. The case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 15 September 2017, the Council was invited to comment on this application and answer specific questions. These included whether the request should have properly been dealt with under the EIRs. The Council was asked to explain the steps it had taken to identify and locate the information requested.
11. The Council responded on 3 October 2017, accepting that the request was for environmental information and should have been dealt with under the EIRs: as a result, it applied the exemption in section 39(2) of FOISA (see below).
12. The Council also commented that, other than that already identified, it did not hold any information falling within the scope of the request under investigation.

Commissioner's analysis and findings

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

Application of the EIRs

14. It is apparent from the terms of the request that the information caught by it would be environmental information as defined by regulation 2(1) of the EIRs. In *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹, the Commissioner confirmed (at paragraph 51) that where environmental information is concerned, there are two separate statutory frameworks for access to that information and, in terms of the legislation, an authority is required to consider the request under both FOISA and EIRs.
15. In its submissions to the Commissioner, the Council acknowledged that Mr Hodge's request should have been responded to under the EIRs and stated that it wished to rely on the exemption in section 39(2) of FOISA in relation to all the information requested. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs.
16. Having considered the terms of the request and the Council's submissions on this point, it is clear that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns the Whitesands Flood Prevention Scheme and, as such, the Commissioner is satisfied that it would fall within either paragraph (a) or paragraph (c) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in Appendix 1 to this decision).
17. In this case, therefore, the Commissioner accepts that the Council was entitled to apply the exemption in section 39(2) of FOISA, given the conclusion that it is properly considered to be environmental information. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
18. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner accepts 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. He has consequently proceeded to consider this case in what follows solely in terms of the EIRs.
19. As the Council failed to recognise and respond to the request as a request for environmental information, the Commission must find that in this regard it failed to respond in accordance with regulation 5(1) of the EIRs.

Was all relevant information identified, located and provided by the Council?

20. 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. While this duty is subject to certain qualifications, none of them appear to be relevant in this case. 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 at that time.
21. The Commissioner has taken account of the submissions provided by Mr Hodge in which he states that he believes the Council should hold further information falling within the scope of his request. While Mr Hodge may have genuine reasons for believing that the Council should hold further information, the Commissioner can only consider whether or not the Council identified and located the information it actually held.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200600654.aspx>

22. The Council submitted that all of the information that it held, falling within the scope of Mr Hodges' requests, had been considered at the time it responded to his requirement for review.
23. The Council explained the searches and enquiries it conducted to identify and locate any relevant information. In addition, it explained that the Project Team had been tasked with presenting a flood prevention option for a 1 in 75 year flood event: as that was the task undertaken, it did not hold information for the other periods specified by Mr Hodge.
24. The Council further explained that, whilst at the time of Mr Hodge's request, it did not hold the information for the 1 in 25 and 1 in 200 year return periods, it subsequently obtained this information from its consultants as it considered it to be in the public interest to do so. It also confirmed this information was provided to Mr Hodge.
25. Mr Hodge acknowledged that the Council had provided him with this further information, but wished a decision on the Council's handling of his request.
26. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations as to what information the authority should hold, ultimately the Commissioner's role (as indicated above) is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).
27. As stated in many previous decisions, the Commissioner's remit extends only to consideration of whether a Scottish public authority actually holds the requested information and whether it has otherwise complied with Part 1 of FOISA or with the EIRs in responding to a request. The Commissioner cannot comment on whether a public authority should have taken particular action or, if it has, what records it should maintain in relation to that action.
28. Having considered the Council's submissions, the Commissioner is satisfied that the Council carried out adequate searches, with a view to identifying and locating the information requested by Mr Hodge. He accepts that Mr Hodge was provided with all of the information held by the Council and falling within the scope of his request. Consequently, the Commissioner is satisfied that, in this regard, the Council complied with regulation 5(1) of the EIRs.

Decision

The Commissioner finds that Dumfries and Galloway Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in dealing with Mr Hodge's request for information.

By failing to identify the information requested as environmental information (as defined by regulation 2(1) of the EIRs) and respond to the request accordingly under the EIRs, the Council failed to comply with regulation 5(1) of the EIRs.

However, the Commissioner is satisfied that the Council identified and located all information that it held and which fell within the scope of Mr Hodge's request.

Appeal

Should either Mr Hodge 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

21 November 2017

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

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- (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.

...

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