

Decision Notice

Decision 194/2016: Company X and City of Edinburgh Council

Community Council publicity on advertising drums

Reference No: 201601010

Decision Date: 15 September 2016



Scottish Information
Commissioner

Summary

On 22 March 2016, Company X asked City of Edinburgh Council (the Council) for information relating to Marchmont and Sciennes Community Council publicity on three specified advertising drums. The Council provided some information, but Company X believed further information was held and applied to the Commissioner for a decision.

During the investigation the Council provided Company X with further information. As a result, the Commissioner found that the Council failed to comply with the EIRs, by not providing Company X with all the relevant information it held until after her investigation had started.

The Commissioner was satisfied that, by the end of the investigation, all relevant information had been provided to Company X.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) 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 22 March 2016 Company X made a request for information to the Council. The information requested was:

“... all information held relating to Marchmont and Sciennes Community Council publicity on three advertising revenue generating furniture structures known as drums situated in a park setting in the Meadows which are owned and operated by City Centre Posters (CCP).”
2. The Council responded on 20 April 2016 and provided Company X with copies of the Community Council Minutes it held and which mentioned the advertising drums. The Council also informed Company X that the Minutes could be found on the Community Council's website.
3. On 21 April 2016, Company X wrote to the Council, requesting a review of its decision on the basis that it required confirmation that these Minutes were the only relevant information held by the Council.
4. The Council notified Company X of the outcome of its review on 20 May 2016. The Council stated that it did not hold any other recorded information falling within the scope of Company X's request. It applied the exception in regulation 10(4)(a) of the EIRs.
5. On 23 May 2016, Company X wrote to the Commissioner. Company X 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. Company X was dissatisfied with

the outcome of the Council's review because it believed further information was held by the Council.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Company X 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. On 23 June 2016, the Council was notified in writing that Company X had made a valid application. The case was then allocated to an investigating officer.
8. 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, with questions focused on the searches carried out to identify and locate any relevant information.
9. The Council responded with submissions on its searches. During the investigation the Council located a further email falling within the scope of the request and provided a copy to Company X.

Commissioner's analysis and findings

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

Application of the EIRs

11. It is clear from the Council's correspondence with both Company X and the Commissioner that the information sought by Company X is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. It relates to structures known as advertising drums, situated in public view on Council-owned land, and the Commissioner is satisfied that it falls within either paragraph (a) or paragraph (c) of the definition in regulation 2(1) (the text of each paragraph is reproduced in Appendix 1). Company X has not disputed this and the Commissioner will consider the request in what follows solely in terms of the EIRs

Regulation 5(1) of the EIRs

12. 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 doesn't.
13. 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.
14. Regulation 10(4)(a) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received.

15. In its submissions to the Commissioner, Company X stated that it did not accept that the Council had provided it with all the information it held and which fell within the scope of its request. Company X believed research and performance evaluation material relating to the drums should be held, and also an email sent by the Council's Parks Officer to the Community Council's Secretary. The email was mentioned in the Community Council Minutes initially provided to Company X.
16. Following discussion with the investigating officer, the Council accepted that the email sent by its Parks Officer to the Community Council's Secretary did fall within the scope of the request. The Council provided a copy of this email, with personal data redacted, to Company X during the investigation. Company X did not dispute the personal data redactions.
17. The Council did not accept that, should it hold research or performance evaluation material on the advertising drums, such information would fall within the scope of Company X's request. It pointed out that these matters were not referred to in the request.
18. The Commissioner has considered the terms of Company X's request. While there is scope for it to have been worded more precisely, the Commissioner is satisfied that the Council's interpretation was reasonable: the wording of the request is sufficiently clear to determine that it relates to "Marchmont and Sciennes Community Council" and "publicity", and gives no indication that it is seeking anything wider.
19. The Council provided the Commissioner with submissions on all the steps taken to identify and locate information falling within the scope of Company X's request. It described the searches carried out, in electronic and paper records, to establish what relevant information it held. It provided evidence of the outcome of these searches.
20. 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, proportionate searches to ascertain whether any relevant information was held. She is satisfied that these were focused on a reasonable interpretation of the request. She is also satisfied that the information located during the investigation and falling within the scope of the request has been provided to Company X.

Public interest test

21. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs.
22. The Council was of the opinion that there was no public interest in requiring that information not held should be made available.
23. The Commissioner accepts that no information is (or was) held, in addition to that provided to Company X. She agrees that there is no conceivable public interest in making available information not held. The Commissioner therefore concludes, in all the circumstances, that the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.

Conclusions – regulation 5(1)

24. The Commissioner is satisfied that any relevant information held by the Council was identified, located and provided to Company X by the end of the investigation. However, she notes that this included additional information provided during the investigation. It is evident, therefore, that the Council did not provide all relevant information in responding to Company

X's information request and requirement for review. In failing to do this, and in applying regulation 10(4)(a) of the EIRs, the Council failed to comply with regulation 5(1) of the EIRs.

Decision

The Commissioner finds that City of Edinburgh Council failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Company X. The Council was wrong to rely on regulation 10(4)(a) in responding to COMPANY X.

The Commissioner therefore finds that the Council failed to comply with regulation 5(1) of the EIRs in responding to the request.

Given that all information held by the Council has now been provided to COMPANY X, the Commissioner does not require the Council to take any action regarding this failure, in response to Company X's application.

Appeal

Should either Company X or City of Edinburgh 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.

Rosemary Agnew
Scottish Information Commissioner

15 September 2016

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)-

...

(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;

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info