

Decision Notice

Decision 196/2015: Mr Neil Vassie and Argyll and Bute Council

Planning application, Lochgilphead

Reference No: 201501217

Decision Date: 16 December 2015



Scottish Information
Commissioner

Summary

On 2 March 2015, Mr Vassie asked Argyll and Bute Council (the Council) for information relating to a planning application for a site in Lochgilphead. The Council provided Mr Vassie with weblinks for the information, which it said was publicly available on its website. Mr Vassie remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council should have dealt with the request under the EIRs. However, she was satisfied that the Council had identified and disclosed all the information it held and which fell within the scope of Mr Vassie's request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections (1) and (6) (General entitlement)

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 2 March 2015, Mr Vassie made the following five part request for information to the Council.

"I am requesting a detailed F.O.I relative to planning application 14/01083/PP validated 27/06/14.

- 1) Specifically, a copy of the submission from Lochgilphead Community Council.

Upon what actuality basis (meter reading) did the Roads Network assess their collusion that Blarbluie Road could take the additional traffic?

- 2) Specifically, I require records showing the traffic count used by the Roads Network.

Transparency, medium used to put this Major Development Notice into the Public Domain?

- 3) Specifically, public domain notice, and date.

Present Listed Building Status of Argyll and Bute Hospital. As at 2012 survey by Historic Scotland.

- 4) Specifically, on what basis did Historic Scotland make their assumption that any change in Listed Status could be changed without Public Consultation?

Neighbour Notification.

- 5) Specifically, a list of those members of the public who have been made aware of this clandestine operation by Argyll and Bute Council."

2. The Council responded (under FOISA) on 29 March 2015. Its response included weblinks to what it considered to be the relevant documents on its planning portal.
3. On 29 March 2015, Mr Vassie wrote to the Council requesting a review of its decision. He highlighted instances where he did not consider the information provided addressed his request.
4. The Council conducted a review, issuing its decision on 28 April 2015. It provided further information and a further explanation of its responses. In relation to the information to be found on its planning portal, it confirmed that it should have cited section 25 of FOISA.
5. On 26 June 2015, Mr Vassie 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 Vassie stated he was dissatisfied with the outcome of the Council's review because he did not believe his request had been addressed fully.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Vassie 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 22 July 2015, the Council was notified in writing that Mr Vassie 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 and answer specific questions. In particular, it was asked to explain the steps it had taken to identify and locate any relevant information it held. It was also asked to comment on whether the request should have been dealt with under the EIRs.
9. The Council responded with its submissions..

Commissioner's analysis and findings

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

Application of FOISA and the EIRs

11. 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 a planning application for a redevelopment of some substance on the site in question. In this context, the Commissioner is satisfied that it would fall within either paragraph (a) or (c) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in Appendix 1 to this decision). In failing to arrive at this conclusion in dealing with Mr Vassie's information request or his requirement for review, the Council failed to comply with section 5(1) of the EIRs.
12. 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. The Council has

not relied upon section 39(2) of FOISA when responding to Mr Vassie's request, or in its submissions to the Commissioner, nor indeed has it provided the Commissioner with any comments on the application of the EIRs.

13. 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.
14. In essence, the issue for Mr Vassie is whether the Council identified and located all the information it held and which fell within the scope of the request. This is all the Commissioner can consider in this decision: the nature of the planning application and whether it was appropriately handled by the Council are clearly matters of concern to Mr Vassie, but they are not matters falling within the remit of this Commissioner.
15. Mr Vassie did not challenge the Council's decision to provide access to some information by means of links to the planning portal on its website, or its decision to apply section 25(1) of FOISA in respect of this information: as a consequence, the Commissioner will not consider these aspects of the Council's handling of the request in this decision.

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 when it receives the applicant's request, 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. Similarly, this requirement is subject to the exceptions and other relevant provisions in the EIRs.
18. Whether the request is considered under FOISA or the EIRs, the question is whether the Council identified and located all the relevant information it actually held. It may be relevant, in reaching a view on this, to consider what information the Council should have recorded and held, but these are not themselves questions the Commissioner can rule on.
19. In his application, Mr Vassie commented on what he perceived to be the absence of relevant information, considering the planning consent was less than a year old. He described the development as involving major works with a considerable impact on Lochgilphead. He provided emails he considered relevant, but it is not clear (beyond a concern about the adequacy of some of the documentation the Council provided, which is not a matter for the Commissioner) why this should be the case. He was unable to be any more specific about the kinds of information he considered to be missing.
20. During the Commissioner's investigation, the Council gave explanations of the information it held for each part of Mr Vassie's request, confirming why it believed this was the correct information to address the relevant part. It confirmed that this information remained online on the planning portal, accessible via its own website.
21. The Council also described the searches it had carried out with a view to identifying and locating the information.
22. 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 applies 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, along with any relevant submissions received from the applicant.

23. In this case, the Commissioner has considered all relevant submissions, along with the information disclosed to Mr Vassie or to which he was given weblinks. All of these links work, and give access to information which would reasonably be expected to address the relevant parts of Mr Vassie's request. It is not clear to the Commissioner why Mr Vassie believes they do not. In all the circumstances, the Commissioner is satisfied that the Council took adequate and proportionate steps to identify and locate the information it held and which fell within the scope of Mr Vassie's request. This information was provided to Mr Vassie, either in specific copies or by giving him links to the relevant case record on the planning portal on the Council's website.
24. Consequently, in respect of the matters raised in Mr Vassie's application and falling within her remit, the only failure the Commissioner can identify on the Council's part is in not identifying the requested information correctly as environmental information and handling the request accordingly, as required by regulation 5(1) of the EIRs.

Decision

The Commissioner finds that the Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Vassie. She is satisfied that the Council identified and provided to Mr Vassie all relevant information it held.

However, the Commissioner also finds that the Council failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in its responses to Mr Vassie's request, by failing to recognise the information it held as environmental information (as defined in regulation 2(1) of the EIRs) and thereby failing to respond to the request in accordance with regulation 5(1) of the EIRs.

Appeal

Should either Mr Vassie 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

16 December 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.

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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