

Decision Notice

Decision 208/2018: Mr J and Glasgow City Council

Complaint and planning information

Reference No: 201800242

Decision Date: 18 December 2018



Scottish Information
Commissioner

Summary

The Council was asked about a planning enforcement complaint and a non-retrospective planning application. The Council provided some information, stating that other information (personal data) was excepted from disclosure.

The Commissioner investigated and identified a number of deficiencies in the Council's handling of the request. However, he was satisfied that, by the end of the investigation, the Council had provided all of the relevant information it held.

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) (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 20 October 2017, Mr J made a request for information to Glasgow City Council (the Council). Mr J submitted the request on the Council's form for making Subject Access Requests under the Data Protection Act 1998 (the DPA 1998). The request was in three parts, with part 2 relating to a specified "enforcement complaint" and part 3 relating to a specified "non-retrospective application".
2. The Council responded on 22 December 2017. The Council advised that it had considered parts 2 and 3 of his request under the EIRs. It also advised that information it considered to be Mr J's personal data was being dealt with under the DPA 1998, and was excepted from disclosure under regulation 11(1) of the EIRs.
3. In relation to parts 2 and 3 of the request, the Council provided information to Mr J, explaining that some information was being withheld on the basis that it was excepted from disclosure under regulation 11(2) of the EIRs. It explained that this exception had been applied to email addresses and telephone numbers of members of the public and details of staff members below Grade 9, as it considered disclosure would breach the data protection principles.
4. The Council further advised Mr J that the EIRs allowed it to refuse to make internal communications available and, in order to fall within this exception, it need only establish that the information is in an internal communication.
5. On 8 January 2018, Mr J wrote to the Council, requesting a review on the basis that it had failed to respond within the time allowed by the EIRs. Mr J also questioned some of the redactions that had been made and submitted that certain information appeared to be missing from the disclosure.
6. Mr J returned documents that had been provided to him in the response and noted his dissatisfaction thereon. This included his dissatisfaction that some of the redactions under

regulation 11(2) appeared to relate to senior members of staff. Mr J also commented that he believed the following information was missing:

- a) No data on the time-barred appeal being received and the consequences of this;
 - b) No data between enforcement and owner re appeal being time-barred;
 - c) No data between enforcement and owner that a planning application was required as the appeal was time-barred;
 - d) No data on appeal register being left blank and representations being made regarding this status;
 - e) No data between enforcement and keeper of register on appeal register being eventually completed stating time-barred;
 - f) No data from enforcement and [named individual] in reply to [named individuals] regarding what they expect to be on applicants submission;
 - g) Planning officer has made mention of having to consult emails from others.
7. The Council notified Mr J of the outcome of its review on 5 February 2018. It advised Mr J that it held no information falling within parts b), d) and e) of his requirement for review. It considered the remainder of the “missing” information to be excepted under regulation 11(2) of the EIRs. Regarding the redacted information, the Council provided a table explaining where the information was excepted under regulation 11(1) and 11(2) of the EIRs.
 8. The Council confirmed that the names of senior staff should not have been redacted. It also advised that it considered certain documents to be outwith the scope of the request.
 9. On 5 February 2018, Mr J wrote to the Commissioner. He applied 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.
 10. Mr J stated he was dissatisfied with the outcome of the Council’s review because it did not respond in accordance with the required timescale. He did not agree with the Council withholding what he considered to be a sizeable amount of information, or accept the Council’s assertion that did not hold information for parts d) and e) of his requirement for review.

Investigation

11. The application was accepted as valid. The Commissioner confirmed that Mr J 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.
12. On 14 March 2018, the Council was notified in writing that Mr J had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr J. The Council provided the information and the case was allocated to an investigating officer.
13. 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 focused on the steps taken by the

Council to identify and locate the requested information, its reasons for withholding information and aspects of its handling of the request.

14. The Council was advised that the information provided to the Commissioner, and Mr J, could not be matched against the information the Council stated had been redacted. It was not clear what had actually been withheld from Mr J and the Council was asked to rectify this.
15. In relation to the redaction of documents under regulation 11(2) of FOISA, the investigating officer raised concerns regarding what appeared to be the wholesale redaction of all names and email contact details. The Council's attention was drawn to *Decision 171/2016: ABW Consultants Limited and West Lothian Council*¹, where the Commissioner had found that any information after the "@" symbol within an email address, which identified either the Council or an external organisation could not, in that case, be considered to be personal data.
16. The Council apologised for being unable to provide an exact copy of the unredacted information. It explained that, due to administrative error, it did not retain a copy of the unredacted information.
17. In an effort to resolve the matter to Mr J's satisfaction, the Council offered to conduct new and full searches for the information that it held, and provide the information to Mr J. This would include provision of the information with the names of senior staff reinstated and the non-redaction of information following the "@" symbol in emails. This approach was accepted by Mr J.
18. During the investigation, and following further correspondence with the Commissioner's office, the Council provided Mr J with a copy of the information it held, with the details of those staff above grade 9 reinstated. The Council explained that, where the information was Mr J's personal data, this had been provided to him under the DPA.
19. Mr J acknowledged receipt of the further disclosures during the investigation and acknowledged that the information provided could now be followed more clearly. However, he questioned the redaction of information from a number of documents provided and whether all information had now been provided, expanding on these concerns in further communications.
20. During the investigation, the Council carried out further searches and provided further explanation to Mr J, along with further information and links to where relevant information was available on its website. In an effort to resolve the issue to Mr J's satisfaction, the Council provided a further copy of two documents, which it considered to be outwith the scope of the request. Some information, however, remained redacted from the two documents disclosed.
21. By the end of the investigation, Mr J remained dissatisfied that all of the information had been provided to him and provided reasoning for this. He also questioned the redaction of information from the two specific documents, which the Council had considered to be outwith the scope of Mr J's request. Mr J made submissions as to why he disagreed that these documents should be considered out of scope.

Commissioner's analysis and findings

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201502206.aspx>

22. 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 him by both Mr J and the Council. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

23. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs. The information relates substantially to a planning application regarding the installation of decking. In reaching this conclusion, the Commissioner has considered the information in question, along with paragraphs (a) and (c) of the definition of environmental information (reproduced in Appendix 1). Mr J has not disputed the Council's decision to handle parts 2 and 3 of his request under the EIRs and the Commissioner will consider the information in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs

24. 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. 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 it does not in fact hold).
25. The Commissioner notes the submissions provided by Mr J as to the importance of the information requested and why he believes the Council should hold further information, other than that provided during of the investigation. He also notes his concerns regarding information redacted from specific documents.

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

26. The Council provided submissions in response to the questions put by the investigating officer on this matter. The Council provided full submissions on the steps taken to identify and locate the information requested by Mr J. It confirmed the searches and enquiries it carried out in response to the request, detailing the officers involved and the places searched (including relevant email records).
27. The Council further advised that, during the investigation, the searches were completed again, to show that robust searches had been carried out. The conclusion of these searches and enquiries was that all of the information that it held, falling within the scope of Mr J's request, had been considered and provided to Mr J. The Council provided supporting evidence evidencing the searches carried out.
28. During the investigation, the Council conducted further searches in response to points raised by both Mr J and the investigating officer, to ensure any information falling within the scope of Mr J's request was identified (bearing in mind its failure to retain an unredacted copy of the information located previously). The Council confirmed that all information located had been provided to Mr J, during the course of the investigation, subject to redaction of personal data and information the Council considered to be outwith the scope of the request. The remaining personal data redactions are not of concern to Mr J.
29. The Council confirmed that the further information located during the investigation was disclosed to Mr J during the investigation. It also disclosed the personal data of senior staff, withheld earlier under regulation 11(2) of the EIRs. This was all information which should have been disclosed at the time the Council dealt with Mr J's request. The Commissioner finds that in failing to do so, the Council failed to comply with regulation 5(1) of the EIRs.

30. Having considered all relevant submissions and the terms of the requests, the Commissioner accepts that the Council interpreted Mr J's requests reasonably and, during the investigation, took adequate, proportionate steps to establish what information it held which fell within the scope of the requests.
31. As mentioned above, the Commissioner can only consider whether information is actually held by the Council, not what information it should hold or what an applicant believes it should hold.
32. In relation to the redaction of information from the two specific documents provided to Mr J, and which he believed should be considered as falling within the scope of the request, the Commissioner has considered the submissions made by both Mr J and the Council. Having considered the information that remained redacted, and all relevant submissions, the Commissioner is satisfied that the redacted information does not fall within the scope of Mr J's request for information. As such, he cannot consider the information to fall within the scope of the investigation or make any decision on these redactions.
33. The Commissioner accepts that, by the end of the investigation, Mr J was provided with all of the information held by the Council and falling within the scope of his requests.

Handling of the request

34. The Commissioner notes that Mr J raised dissatisfaction with the procedural aspects of the Council's handling of his request. In this regard, the Commissioner believes there are significant issues he should consider further.
35. Regulation 5(2)(a) of the EIRs gives Scottish public authorities a maximum of 20 working days after receipt of the request to comply with a request for information, subject to certain qualifications which are not relevant in this case.
36. In its submissions to the Commissioner, the Council apologised for the delay in responding to Mr J, acknowledging that he should have received a response within the statutory timeframe. The Council stated that, while this was the result of the workload within the department, it understood the importance of complying with statutory timescales and was committed to ensuring that FOI matters were properly resourced. It stated it was striving to improve its processes in this regard, describing the organisational, monitoring, reporting and training arrangements it was putting in place for this purpose.
37. Given that the Council did not respond to Mr J's request for information of 20 October 2017 within the required 20 working days, it is apparent that the Council failed to comply with the requirements of regulation 5(2)(a) of the EIRs.
38. In addition, there are other aspects of the Council's practice in handling Mr J's request which the Commissioner must highlight as unacceptable. On being asked to provide him with the withheld information, the Council was unable to do so in a satisfactory manner. This resulted in a considerable delay to the Commissioner's investigation.
39. The Commissioner would point out that paragraph 6.2.3 in Part 2 of the Scottish Ministers' Code of Practice (the Section 60 Code)² states:

² <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2016/12/foi-eir-section-60-code-of-practice/documents/e8e4fb4a-d101-40c4-aa33-388776b952d8/e8e4fb4a-d101-40c4-aa33-388776b952d8/govscot%3Adocument>

“Authorities should, where appropriate, maintain a record of searches conducted, including details of who carried out the searches and the systems that were checked. Records of searches provide helpful evidence to reviewers and, in the event of an appeal, to the Commissioner.”

40. In addition, paragraph 11.1.2 provides good practice guidance on providing the Commissioner with the withheld information, within the timescales requested, detailed in a schedule of documents and (where applicable) clearly indicating what has been disclosed already: the Council acknowledged that due to, what it described as an administrative error, failures in record keeping meant this guidance could not be followed when an application was made to the Commissioner.
41. In this case, the Council's failure to retain unredacted records of the information identified and located in responding to the request highlights a failure to comply with the above guidance, necessitating further searches and consequent delay during the investigation.
42. The Commissioner is also concerned that a blanket approach was taken in the redaction of all names and email addresses when responding to Mr J. As accepted by the Council during the investigation, the redaction of all information following the “@” symbol in email addresses is not appropriate, assuming (as in this case) there is no personal identifying information there. Not only will such information not be considered personal data, it also means that the recipient is unable to identify the source of any such communication (at a non-personal level).
43. The Commissioner acknowledges, however, that during the investigation the Council attempted to rectify the earlier failures by conducting sufficient and adequate searches, resulting in the provision of information (including information incorrectly withheld earlier under regulation 11(2) of the EIRs).
44. The Council itself acknowledged that there were several learning points to be taken from its handling of Mr J's request and application to the Commissioner. It explained that it had agreed training for the department in question, which was keen to improve its processes in relation to the management of information requests. Senior management within the department had been made aware of this appeal and the Council assured the Commissioner that it remained committed to improving its processes in relation to information requests.

Decision

The Commissioner finds that Glasgow City Council failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr J.

The Commissioner finds that by failing to identify all of the information requested at the time it dealt with the request, and by failing to respond to Mr J's request within the timescales laid down by the EIRs, the Council failed to comply with regulation 5(1) and (2) of the EIRs.

Appeal

Should either Mr J or Glasgow City 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

18 December 2018

Appendix 1: Relevant statutory provisions

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.

(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.

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