

Decision Notice

Decision 209/2014: Mrs Patricia Wade and the City of Edinburgh Council

Edinburgh Tram Vehicles

Reference No: 201400025

Decision Date: 25 September 2014



Scottish Information
Commissioner

Summary

On 14 July 2013, Mrs Wade asked the City of Edinburgh Council (the Council) for information about the choice of vehicle for the Edinburgh trams.

The Council told Mrs Wade it did not hold any of the information she had asked for. Following a review, Ms Wade remained dissatisfied and applied to the Commissioner for a decision. Although the Commissioner was satisfied that the Council did not hold any relevant information, she found that the Council had failed to provide Mrs Wade with reasonable advice and assistance in making her request. However, the Commissioner did not require the Council to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (3) 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) (paragraphs (a) and (c) of definition of "environmental information") (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 9(1), (2) and (4) (Duty to provide advice and assistance); 10(1) 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 the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 14 July 2013, Mrs Wade made a request for information to the Council on the subject of the Edinburgh trams. The information requested was:
 - “Were any of the other tenders for proper lightweight vehicles, common abroad” and
 - “All the bidders were based on rail contractors, not ‘trams’ specialists. Why?”
2. The Council responded on 9 September 2013, giving notice, in terms of regulation 10(4)(a) of the EIRs, that it did not hold this information. The Council explained that the tendering process was overseen by the Council’s agent, tie Ltd, and tenders for the supply of the tram vehicles had been returned to tie Ltd several years ago. The Council referred to its response to an earlier request by Mrs Wade, in which it had provided references to articles about the Edinburgh Trams. The Council confirmed that 11 firms originally expressed interest in providing the tram vehicles, seven of which then bid for the opportunity to tender. Four tram manufacturing firms were then asked to provide more detailed proposals; all four had supplied tram vehicles to cities abroad. The Council listed the firms and the cities.
3. On 20 September 2013, Mrs Wade wrote to the Council requesting a review of its decision. In particular, Ms Wade drew the Council’s attention to her view about the damage and disruption that had been caused by choosing a train as opposed to a lightweight tram vehicle.

4. The Council notified Mrs Wade of the outcome of its review on 23 October 2013. The review upheld the Council's original decision. Additionally, the Council explained that tie Ltd had followed EU procurement regulations in making its decision on awarding the contract for the Edinburgh tram vehicles. The Council explained that tie Ltd's recommendation had been approved by the Council.
5. On 20 December 2013, Mrs Wade 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. Mrs Wade stated she was dissatisfied with the outcome of the Council's review because she did not believe that the information she requested was not held by the Council.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mrs Wade 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. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 29 January 2014, the Council was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA or the EIRs it considered applicable to the information requested.
8. In conversations with the investigating officer, the Council explained that it held a considerable volume of information on the Trams Project, and indicated that it would disclose some information to Mrs Wade, such as an extract from the tram specification and details from the websites of companies that tendered, which showed that they manufactured trams.
9. On 14 March 2014, Mrs Wade told the investigating officer that she wished to see the tenders to see if any tenderer had proposed a small vehicle or tram that, in her view, would be more suitable for Edinburgh.
10. On 19 May 2014, the Council sent Mrs Wade a redacted version of the *Invitation to Negotiate ("ITN") for the Proposed Award of an Agreement for the Design, Manufacture and Supply of Trams and Associated Equipment and an Agreement for the Provision of Tram Maintenance Services for the Edinburgh Tram Network (7 July 2006)*. This set out the technical specification for tendering companies.
11. On receiving this information, Mrs Wade replied to the investigating officer on 28 May 2014 that the ITN was not what she wanted, but she thanked the Council for its effort to provide the copy to her. Mrs Wade commented that she wanted to know if there had been any consultation that went into the creation of the tender, and whether the weight or type of tram/vehicle was considered then.
12. The Council provided a submission to the Commissioner on 7 July 2014. It stated that it had already provided Mrs Wade with information which confirmed that all of the manufacturers which submitted tenders were producing "lightweight vehicles" abroad. The Council believed that there could be some confusion regarding the term "proper lightweight vehicles", used by Mrs Wade in her request, as there was not a clear definition of what distinguishes "light rail" from "trams". It explained that virtually every tram system could be considered as light rail, but only those light rail systems which feature street running could be called trams.

13. The investigating officer had more discussion with Mrs Wade about her concerns and the information she had hoped to obtain when making her request. Following this, on 28 August 2014, staff from the Commissioner's office met with the Council to view information held by the Council, including the tenders submitted from each of the interested companies, with particular reference to the tram specification. This was to ascertain if there was any information within these tenders that would either fall within Mrs Wade's request of 14 July 2013 (with respect to lightweight vehicles), and if so, whether that information could be provided to Mrs Wade. The Commissioner's staff also discussed with the Council whether it held recorded information on how decisions were taken by tie Ltd in drawing up the specification for the tram vehicles (e.g. if there were weight constraints etc.), or information on how decisions were made after the tenders were received.
14. At the meeting, the Council agreed to provide Mrs Wade with redacted extracts relating to the weight of vehicles from the *Tram Requirements Specification Employers Requirements*. This included a section headed "General Technical Specification" which stipulated (at 2.1.1) that the trams must be "low weight". Another extract stated the "Specific technical requirements", some of which related to weight.
15. Mrs Wade was also informed that the information in the tenders submitted by the interested companies has not yet been made public, and the Council would seek to withhold information from the tenders. The Council referred in general terms to the confidentiality of the tenders.
16. On receiving the extracts from the *Tram Requirements Specification Employers Requirements*, Mrs Wade replied to the investigating officer on 9 September 2014 that this was not the information she wished. Again, she asked if there had been any consideration during the Trams Project of a tram vehicle that was closer in resemblance to what she regarded as a traditional tram, rather than a train/rail vehicle.

Commissioner's analysis and findings

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

Application of the EIRs

18. The Council responded to Mrs Wade's request under the EIRs.
19. Mrs Wade has not disputed that the information covered by her request, if held, would be environmental information.
20. During the investigation, the Council submitted that Mrs Wade's request was for environmental information. The information covered by her request (if held) would meet definition (c) (in association with definition (a)) of environmental information as set out in regulation 2(1) of the EIRs.
21. The Commissioner accepts that the requested information relates to the construction of a significant piece of transport infrastructure (the Edinburgh tram project). As with previous decisions involving this project, the Commissioner is of the view that this would constitute information on measures and activities affecting, or likely to affect, the elements of the environment, in particular land and landscape. The development of the Edinburgh tram system, and the selection of a specific vehicle with respect to its suitability, would inevitably

have a significant environmental impact. As the Commissioner previously stated in *Decision 009/2010 Mr Carson and tie Ltd*¹:

"This programme [the Edinburgh Tram Project] will affect both the state of the elements of the environment, and factors that affect the state of those elements, given the construction work involved, as well as the project's potential for affecting future transport-related carbon dioxide emissions when subsequently in use."

22. The Commissioner therefore considers that information covered by Mrs Wade's request, if held, would fall within the definition of environmental information contained in paragraph (c) of regulation 2(1) of the EIRs.

Section 39(2) of FOISA

23. During the investigation, the Council confirmed that it wished to rely on the exemption in section 39(2) of FOISA.
24. 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. In this case, the Commissioner accepts that the Council was entitled to apply this exemption to the information requested by Mrs Wade, given the Commissioner's conclusion that, if any relevant information was held, it would all be environmental information.
25. The exemption in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to Mrs Wade in this case, the Commissioner has also concluded that the public interest in maintaining this exemption, and in dealing with the request in line with the EIRs, outweighs the public interest in disclosure of the information under FOISA.
26. The Commissioner will consider the information in what follows solely in terms of the EIRs.

Interpretation of the requests

27. It became clear during the investigation of this case that the Council had found it difficult to identify what information which Mrs Wade wanted to receive, based on the terms of her request.
28. Mrs Wade asked:

"Were any of the other tenders for proper lightweight vehicles, common abroad?" and

"All the bidders were based on rail contractors, not 'tram' specialists. Why?"
29. In interpreting information requests, the Commissioner believes that the words used in the request should generally be given their plain, ordinary meaning. Similarly, the Commissioner expects requests to be interpreted in an objective manner, rather than with reference to what a public authority considers a requester may have intended.
30. However, Mrs Wade's requests refer to "proper lightweight vehicles", "bidders", "rail contractors" and "tram specialists". The Commissioner accepts that some of these terms are capable of having specific technical meaning as well as the meaning understood by a lay person.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2010/200901284.aspx>

31. The Council's submission acknowledged that there was confusion regarding the term 'proper lightweight vehicles' used by Mrs Wade, which appeared to remain unresolved. The Council acknowledged that it should have sought to clarify this earlier in the process with Mrs Wade, but stated that there is not a clear definition of what constitutes 'light rail' or what differences distinguish 'light rail' and trams. (During the investigation, it became clear that there were differences in the interpretation of the expressions used in the request, listed above. There may also have been differences in interpreting what were referred to by Mrs Wade as "tenders" or "bidders".)
32. The Council also commented that, on reflection, Mrs Wade's questions were seeking an opinion and were not necessarily a request for recorded information held by the Council. However, as they were answered within the context of the EIRs the Council stated it would "seek to resolve the matter within the terms of the legislation."
33. The Commissioner regards the first question (*Were any of the other tenders for proper lightweight vehicles, common abroad*) as a request for factual information, at least on face value. It would seem to be answerable by a "yes" or "no", which might be discerned from information in the tenders. However, the Commissioner acknowledges that in order to answer the question, it is first necessary to understand what Mrs Wade meant by "proper lightweight vehicles, common abroad".
34. The Commissioner also notes that Mrs Wade's interest seemed to extend to information about decisions which were taken at an early stage, when the tender specification was being drawn up, some time before the final four tram manufacturing firms were asked to provide more detailed proposals. However, she framed her request in terms of "the other tenders" which could be seen to restrict the request to information from the last stage of the process, when the final three tenders were submitted.
35. The second request asks "Why?" It provides a statement (*All the bidders were based on rail contractors, not 'tram' specialists*) and asks for an explanation. Even if the expressions used were completely unambiguous, or the statement accepted to be true, it still seems possible to the Commissioner that this request could be interpreted in a number of reasonable ways. In this context, the Council's comment that this question was seeking opinion and not necessarily a request for recorded information held by the Council, may also have been relevant, in terms of how the Council dealt with the request.
36. Section 1(3) of FOISA provides that a Scottish public authority is not obliged to respond to an information request if it requires further information to identify and locate the information an applicant has requested, and has told the applicant so (specifying what further information is needed). A public authority is only entitled to seek such clarification if the requirement for further information is reasonable. Regulation 9(2) and (4) of the EIRs provide that where a request has been formulated in too general a manner, the authority shall ask the applicant for more particulars, and assist the applicant in providing those particulars. The authority is not required to respond to the request until it has received this information from the applicant.
37. The Council did not rely on either provision in responding to Mrs Wade's requests. The Commissioner has considered whether this was reasonable, or whether, in terms of the Council's duty to provide advice and assistance to Mrs Wade, it should have sought clarification of the information covered by her request.
38. As noted above, the Commissioner considers that there was some ambiguity in the way Mrs Wade's requests were phrased. Discussions with Mrs Wade during the investigation have shown that her requests may not have been phrased in a way which completely identified all

the information she sought, and that she was actually seeking more information than her request expressed on any reasonable reading. The Commissioner would not have expected the Council, from the words of the request, to have reasonably interpreted it as a request covering all the information which the Commissioner now understands Mrs Wade would like to obtain.

39. In all the circumstances of this case, the Commissioner considers that it would have been reasonable for the Council to require Mrs Wade to explain more clearly exactly what recorded information she was seeking in her requests, so that it could identify the relevant information. This is not to suggest that there was any fault in how Mrs Wade worded her requests, simply that in seeking information about technical specifications, clarity was paramount. The Council has acknowledged that it holds a considerable amount of information on the Trams Project, which would make it all the more necessary for the Council to be able to accurately identify the information which Mrs Wade hoped to obtain, when responding to her requests.
40. The Commissioner takes the view that, had the Council asked Mrs Wade to clarify her requests, it is quite possible that it would have discovered that she required further advice and assistance to help her understand what decisions were taken at each stage of process of agreeing a technical specification for the trams and obtaining tender bids. This would have helped her to frame her request in a way which presented fewer difficulties in its interpretation.

Advice and assistance

41. Regulation 9(1) of the EIRs provides that a Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to applicants and prospective applicants.
42. The Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs (the Section 60/62 Code)² states (at 1.3) that authorities should be flexible in offering advice and assistance, which can be given either before a request is made, or to clarify what information an applicant wants after a request has been made.
43. The Section 60/62 Code (at 1.4) also provides that the advice and assistance will depend on the particular circumstances of the case and notes that there will be certain individuals who may not be expected to express themselves with precision and who need more support in describing the information they wish to receive.
44. It should have been evident to the Council that Mrs Wade could have benefitted from advice and assistance in framing a request involving technical information and an administrative process with which she was unfamiliar. Mrs Wade had already made several requests to the Council for similar information. In failing to provide such advice and assistance, the Council failed to comply with regulation 9(1).
45. The Commissioner is aware that, during the investigation, the Council has tried to engage with Mrs Wade and to provide any information which might have satisfied her request. To this extent, the Commissioner commends the Council, but finds that more assistance should have been offered to Mrs Wade when the Council received her request, given the obvious difficulties it presented.

² <http://www.scotland.gov.uk/Resource/Doc/933/0109425.pdf>

46. Mrs Wade is aware of how to make a further information request, should she wish to do so, and particularly that a request for environmental information can be made verbally.

Conclusion

47. Mrs Wade applied to the Commissioner for a decision because she did not accept that the Council held no information covered by her request. As explained above, there has been some difficulty in establishing exactly what information would be captured by Mrs Wade's request.
48. After investigating, the Commissioner accepts that the Council does not hold any information which would directly answer the questions posed in Mrs Wade's information request, apart from information which it had provided in response to a previous information request. As noted above, the Commissioner considers it likely that Mrs Wade may have chosen to re-word her request if she had been asked for clarification or given more assistance in making her request. However, the Commissioner accepts that the Council complied with the EIRs in giving Mrs Wade notice, in terms of regulation 10(4)(a), that it did not hold the information she had asked for. The Commissioner also notes that the Council made several attempts to provide Mrs Wade with relevant information during the investigation.

Decision

The Commissioner finds that the City of Edinburgh Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mrs Wade. The Commissioner finds that the Council was correct to give Mrs Wade notice, in terms of regulation 10(4)(a), that it did not hold information covered by her request. However, the Commissioner finds that the Council failed to comply with regulation 9(1) of the EIRs by failing to provide reasonable advice and assistance to Mrs Wade.

The Commissioner does not require the Council to take any action in respect of this failure in response to Mrs Wade's application.

Appeal

Should either Mrs Wade or the 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.

Margaret Keyse
Head of Enforcement

25 September 2014

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.

...

- (3) If the authority –
- (a) requires further information in order to identify and locate the requested information; and
 - (b) has told the applicant so (specifying what the requirement for further information is),

then provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.

...

- (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)–

...

(b) is subject to regulations 6 to 12.

...

9 Duty to provide advice and assistance

(1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

(2) Where a request has been formulated in too general a manner, the authority shall–

(a) ask the applicant as soon as possible, and in any event no later than 20 working days after the date of receipt of request, to provide more particulars in relation to the request; and

(b) assist the applicant in providing those particulars.

...

(4) In any case to which paragraph (2) applies, the date on which the further particulars are received by the authority shall be treated as the date of the request for the purposes of regulations 5(2)(a), 6(2)(a) and 13(a) and any period within which the authority is required to respond to that request by these Regulations shall begin on the day following that date.

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.

...

- (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;

...

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