



Decision Notice 082/2024

Planning file

Authority: Highland Council

Case Ref: 202400221

Summary

The Applicant asked the Authority for a specific planning file. The Authority initially told the Applicant that it did not hold the information requested. Following a review, the Authority claimed that the information was excepted from disclosure because the request was formulated in too general a manner. The Commissioner investigated and found that the Authority's response failed to comply with the EIRs, as it had failed to provide the Applicant with the required advice and assistance. The Commissioner required the Authority to provide advice and assistance to the Applicant and to issue a revised review outcome.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) section 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of "the Act", "applicant" and "the Commissioner") (Interpretation); 2(2) (Definition of information held); 5(1) (Duty to make environmental information available on request); 9 (Duty to provide advice and assistance); 10(1), (2), and (4)(c) (Exceptions from duty to make environmental information available); 17(1), (2)(a) and (b) (Enforcement and appeal provisions)

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 7 August 2023, the Applicant made a request for information to the Authority. Among other things, he asked for files relating to a request for planning permission in 2001 at a

specific location. He also provided further details, including the names of the individuals he believed submitted the application, to assist the Authority in locating the file.

2. The Authority responded on 3 October 2023 with a notice, under regulation 10(4)(a) of the EIRs, that it did not hold the information requested.
3. On 4 October 2023, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because the Authority was obliged to retain the information requested and the information should be accessible by any member of the public at any time.
4. The Applicant did not receive a response to his requirement for review.
5. The Applicant wrote to the Commissioner, stating that he was dissatisfied with the Authority's failure to respond and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. The enforcement provisions of FOISA apply to the enforcement of the EIRs, subject to specified modifications – see regulation 17.
6. In [Decision 029/2024](#)¹, the Commissioner found that the Authority had failed to respond to the Applicant's request for information and requirement for review within the timescales laid down by sections 10(1) and 21(1) of FOISA and regulations 5(2) and 16(4) of the EIRs.
7. The Authority notified the Applicant of the outcome of its review on 25 January 2024. The Authority explained that it was possible that it held the information requested, but it was unable to locate it without further details (specifically, the reference number of application). The Authority therefore withdrew its reliance on regulation 10(4)(a) of the EIRs and instead relied on regulation 10(4)(c) (Request formulated in too general a manner).
8. On 7 February 2024, the Applicant wrote to the Commissioner, applying 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. The Applicant stated that he was dissatisfied with the outcome of the Authority's review because he had previously had access to the information requested and therefore believed that the Authority held it and that it had either been "unable or incompetent" in its efforts to find it.

Investigation

9. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
10. On 1 March 2024, the Authority was notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to the searches the Authority carried out and the advice and assistance it provided to the Applicant.
12. During the investigation, the Authority stated that it was uncomfortable applying regulation 10(4)(a) of the EIRs because it may hold the information requested. However, the Authority

¹ <https://www.itspublicknowledge.info/decision-0292024>

explained that it would accept that regulation 10(4)(a) applied if the Commissioner found that it did.

13. As the Authority did not withdraw its reliance on regulation 10(4)(c) of the EIRs, the Commissioner will not consider regulation 10(4)(a) and his decision will focus solely on regulation 10(4)(c).

Commissioner's analysis and findings

14. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Application of the EIRs

15. The information requested appears to fall clearly within the scope of the definition of environmental information contained in regulation 2(1) of the EIRs.
16. The Applicant made no comment on the Authority's application of the EIRs in this case, and the Commissioner will consider the request in what follows solely in terms of the EIRs.

Regulation 5(1) – Duty to make environmental information available

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 an applicant. This obligation relates to information that is held by the authority when it receives a request.
18. Under the EIRs, a Scottish public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.

Regulation 10(4)(c) – Request formulated in too general a manner

19. Regulation 10(4)(c) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that the request for information is formulated in too general a manner and the authority has complied with its duty under regulation 9. Regulation 9 of the EIRs requires Scottish public authorities to provide advice and assistance to applicants and prospective applicants: where the authority believes the request is formulated in too general a manner, there is a specific duty (regulation 9(2)) to ask the applicant for more particulars in relation to the request and assist the applicant in providing those particulars.
20. Neither the Aarhus Convention nor the EIRs specify what is meant by "formulated in too general a manner". The Commissioner's expectation is that there must be implications for an authority's ability to identify the information requested, or to comply with the request in some other respect. Even if a request is general in terms, but the authority is able to identify the information requested and respond within an extended 40 working day timeframe (applying regulation 7), it is unlikely to be "too general" for the purpose of the EIRs.

The Authority's submissions on the exception

21. The Authority explained that the information requested was likely to predate its current online planning site and that it had therefore carried out manual inspections of planning registers and maps. The Authority provided evidence to the Commissioner of the searches that had been undertaken by its planning and archive teams, which yielded no relevant information.

22. For completeness, the Authority stated that it had also carried out searches of its online planning system. The Authority confirmed that those searches also yielded no relevant information.
23. The Authority explained that it had carried out searches using the information the Applicant had provide about the date and location of the planning application, as well as the names associated with it.
24. On this basis, the Authority concluded that it had insufficient detail to enable it to locate the information requested and that it had, in the circumstances, carried out adequate and proportionate searches. Otherwise, the Authority stated that it would have to manually review every case file and archive box which would be an unreasonable amount of effort.
25. The Authority provided evidence from its planning and archives teams suggesting that it would be possible to carry out more focused searches of its planning registers and archives, but that this would require the reference number for the planning application.
26. The Authority also suggested that it was possible the planning application had been made under names other than those provided by the Applicant. If so, the correct names could assist in conducting further searches.
27. The Authority therefore concluded that it might hold the information requested, but that it could not say so with certainty. The Authority explained that it therefore considered it “more appropriate” to rely on the exception in regulation 10(4)(c) of the EIRs.
28. The Authority accepted that it had not, within 20 working days of receiving the request, asked the Applicant to provide more particulars in relation to the request and assisted the Applicant to provide those particulars.
29. In its review response, the Authority stated that it did not believe it had provided the Applicant with sufficient advice and assistance in response to his request.
30. When asked why it did not provide advice and assistance to the Applicant prior to issuing its review outcome, the Authority explained that it had emailed the Applicant on 14 November 2023, before issuing its review outcome, advising him that it could not locate the information requested without the planning reference number. The Authority noted that the Applicant subsequently provided it with some further information.
31. The Authority explained that it therefore considered it had explained the situation sufficiently and that the Applicant was unable to provide any further information.
32. The Authority also noted that its response to the Applicant’s requirement for review was already late and explained that it did not consider matters would be improved if it returned to the Applicant for further information before issuing its review outcome.

The Applicant's submissions on the exception

33. The Applicant submitted that the Authority was required to retain planning files and that it should therefore hold the information requested.
34. The Applicant explained that he considered that he had provided the Authority with sufficient information from the outset to locate the information requested, but that it had failed to do so and that its efforts in doing so had either been “unable or incompetent”.
35. The Applicant also noted that the Authority had not disputed that it should hold the information requested.

The Commissioner's view on the exception

36. The exception contained in regulation 10(4)(c) can only be upheld if the authority claiming the exception has complied with its duties under regulation 9 of the EIRs. As the Authority believed this exception to be applicable when it conducted its review, the Commissioner will first consider whether the Authority fulfilled its duties under regulation 9 in responding to the Applicant's request.
37. Regulation 9(2) of the EIRs provides that where a request has been formulated in too general a manner, the authority must ask the applicant to provide more particulars in relation to the request, and must assist the applicant in providing those particulars.
38. The Commissioner notes that the Authority accepted, in its review response, that it did not believe it had provided the Applicant with sufficient advice and assistance in response to his request.
39. The Commissioner does not consider that the Authority's email of 14 November 2023 satisfies regulation 9(2) of the EIRs: it did not ask the Applicant to provide more particulars, nor did it assist him in doing so (though the Applicant subsequently volunteered some further information).
40. The Commissioner also considers it unsatisfactory for the Authority to have declined to discharge its duties under regulation 9(2) of the EIRs on the basis that its response to his requirement for review was already late.
41. Taking all of the circumstances into consideration, the Commissioner finds that the Authority has failed to justify its application of regulation 10(4)(c) of the EIRs. Even if the request was formulated in too general a manner (the Commissioner has not reached a view on this), the Authority failed to fulfil the consequent duties required by regulation 9(2) of the EIRs.
42. While the Applicant does not appear to possess the reference numbers that the Authority maintains that it requires, he does appear to possess other information that may assist the Authority in locating the information requested.
43. The Commissioner therefore requires the Authority to provide advice and assistance to the Applicant, in line with regulation 9(2) of the EIRs, and to provide him with a revised review response.

Decision

The Commissioner finds that the Authority failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

In particular, the Commissioner finds that the Authority failed to comply with regulations 9(2) and 10(4)(c) of the EIRs.

The Commissioner therefore requires the Authority to provide advice and assistance to the Applicant, in line with regulation 9(2) of the EIRs, and to provide him with a revised review response, in terms of regulation 16 of the EIRs, by **21 June 2024**.

Appeal

Should either the Applicant or the Authority 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.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

David Hamilton
Scottish Information Commissioner

7 May 2024

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
- (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);
and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

“applicant” means any person who requests that environmental information be made available;

“the Commissioner” means the Scottish Information Commissioner constituted by section 42 of the Act;

...

“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
- (b) actors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (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;

...

(2) For the purpose of these Regulations, environmental information is held by a Scottish public authority if it is-

- (a) in its possession and it has been produced or received by that authority; or
- (b) held by another person on that authority's behalf,

and, in either case, it has not been supplied by a Minister of the Crown or department of the Government of the United Kingdom and held in confidence.

...

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.

...

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.
 - (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;
- ...
- (c) the request for information is formulated in too general a manner and the authority has complied with its duty under regulation 9;
- ...

17 Enforcement and appeal provisions

- (1) The provisions of Part 4 of the Act (Enforcement) including schedule 3 (powers of entry and inspection), shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in paragraph (2).
- (2) In the application of any provision of the Act by paragraph (1) any reference to -
 - (a) the Act is deemed to be a reference to these Regulations;

(b) the requirements of Part 1 of the Act is deemed to be a reference to the requirements of these Regulations;

...

(f) a notice under section 21(5) or (9) (review by a Scottish public authority) of the Act is deemed to be a reference to a notice under regulation 16(4); and

...