



Decision Notice 151/2024

Information relating to a specific provision of planning law

Authority: Scottish Borders Council

Case Ref: 202200824

Summary

The Applicant asked the Authority for information relating to specific provision of planning law. The Authority informed the Applicant that it did not hold any information falling within scope of the request. The Commissioner investigated and found that the Authority had failed to provide adequate submissions to justify its position. He required the Authority to carry out a fresh review and to provide the Applicant with a revised review outcome.

Background

1. On 6 June 2022, the Applicant wrote to the Authority and made a number of requests.
2. On 8 June 2022 the Authority wrote to the Applicant to confirm what information he was seeking.
3. On 9 June 2022, the Applicant confirmed he was, among other things, seeking:
“All information held by the [Authority] in relation to section d including the reason why it was not included in [the Authority’s response to the Applicant’s previous correspondence].”
4. By way of background, the Applicant explained that, in the previous correspondence mentioned above, the Authority had referred to section 8(3) of The Planning (Listed Building and Conservation Areas) (Scotland) Act 1997 (the Act), but had not included section 8(3)(d) (“section d”) when quoting the Act.
5. The Authority responded on 27 June 2022. In its response, the Authority noted that it had processed the request under the Environmental Information (Scotland) Regulations 2004 (EIRs) and stated that it held no record of communications for the cases that were the subject of the Applicant’s previous correspondence.

6. On the same day, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because his request sought “all the information” held by the Authority in relation to “section d”; it was not limited to cases covered by his previous correspondence.
7. The Authority notified the Applicant of the outcome of its review on 22 July 2022, fully upholding its original response. The Authority explained that it had determined that “section d” referred to section 8(3)(d) of the Act. The Authority issued a notice, under regulation 10(4)(a) of the EIRs, notifying the Applicant that it did not hold any information falling within scope of his request.
8. On the same day, the Applicant wrote to the Commissioner, applying 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. The Applicant stated that he was dissatisfied with the outcome of the Authority’s review because he did not consider it credible that the Authority did not hold information relevant to his request.

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 21 September 2022, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice of the application in writing and invited its comments.
11. The case was subsequently allocated to an investigating officer.
12. Both the Applicant and the Authority provided comments.

Commissioner’s analysis and findings

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

Application of the EIRs

14. Where information falls within the scope of the definition of “environmental information” in regulation 2(1) of the EIRs, a person has a right to access it (and the public authority a corresponding obligation to respond) under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
15. The Commissioner is satisfied that the information requested falls within the definition of environmental information in regulation 2(1) of the EIRs (particularly paragraphs (a) and (c) of that definition).
16. The Applicant did not challenge the Authority’s decision to deal with the request as one for environmental information. In what follows, the Commissioner will consider this case solely in terms of the EIRs.

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

17. 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. This obligation relates to information that is held by the authority when it receives a request.
18. 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.

Regulation 10(4)(a) – Information not held

19. 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 it received the request.
20. In considering whether a Scottish public authority holds the requested information in any given case, the Commissioner must be satisfied that the authority has carried out adequate, proportionate searches in the circumstances, taking account of the terms of the request and all other relevant circumstances.
21. The Commissioner will consider the scope, quality, thoroughness and results of those searches, applying the civil standard of proof (the balance of probabilities). Where appropriate, he will also consider any reasons offered by the public authority to explain why it does not, or could not reasonably be expected to, hold the information.
22. In all cases, it falls to the public authority to persuade the Commissioner, with reference to adequate, relevant descriptions and evidence, that it does not hold the information (or holds no more information than it has identified and located in response to the request). In this case, notwithstanding the opportunity given to provide comments, the Commissioner is not satisfied that the Authority has achieved this. Specifically, the Commissioner finds that the Authority's submissions on searches fall short in the following key respects:
 - in general terms, it failed to describe the searches it carried out or provide any detail or evidence of those searches
 - more specifically, despite the Applicant's particular interest in the process of approving the response to his previous correspondence, the Authority has not provided evidence of searches of documents relating to this process.
23. When the Commissioner requested comments from the Authority, he asked it to read his guidance on what is needed from public authorities in order for him to come to a decision. In respect of cases, such as this one, where an Authority considers information to not be held the Commissioner's guidance specifically states that he requires the following information:
 - which searches were carried out, including:
 - (a) search terms used and timeframe searched against;
 - (b) why these were considered likely to retrieve the information;

- (c) who carried out the searches and why were they the people best placed to carry out the searches;
 - (d) which sets of records or data were searched (information may be held on WhatsApp, mobile phones, etc.);
- if no searches were carried out, an explanation of why the Authority considered that no searches were needed;
 - if the case is handled under the EIRs, comment on the public interest.
24. In all the circumstances, therefore, the Commissioner cannot uphold the Authority's claim that it does not hold the requested information. He requires the Authority to carry out fresh searches for the information requested.
25. The Commissioner cannot, therefore, find that the Authority was entitled to rely on regulation 10(4)(a) of the EIRs in this case.

Regulation 9 – Duty to provide advice and assistance

26. Regulation 9 of the EIRs requires Scottish public authorities to provide advice and assistance to applicants, so far as it would be reasonable to expect them do so.
27. Regulation 9(3) of the EIRs provides that a Scottish public authority shall be taken to have complied with this duty if it conforms with the guidance contained in the Scottish Ministers' [Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs](#)¹ (the Section 60 Code).
28. The Section 60 Code contains best practice guidance for public authorities on discharging their functions under FOISA and the EIRs, including in relation to the provision of advice and assistance.
29. Paragraph 5.3.3 of Part 2 of the Section 60 code states that if an authority is unsure about what information the applicant wants, it should obtain clarification by performing its duty to provide reasonable advice and assistance to the applicant.
30. In this case, the Applicant sought "all information" held on a particular topic ("section d"). At the same time, the Applicant expressed a particular interest in a subset of this information (information held on "section d" in relation to his earlier correspondence), and his requirement for review appeared to focus on this subset of information.
31. Given the potentially broad nature of the request, the context in which it was made (referring to previous correspondence) and the apparent interest the Applicant has in a particular subset of information, the Commissioner considers it would have been appropriate for the Authority to have sought further clarification of the request.
32. In failing to do so, the Commissioner concludes that the Authority failed to comply with its duty under regulation 9 of the EIRs to provide the Applicant with the requisite advice and assistance.
33. The Commissioner cannot stress enough the importance of ensuring that the terms of any information request received by a Scottish public authority are clear before proceeding to respond. He would urge the Authority, and indeed all Scottish public authorities, to take

¹ [FOI/EIR: section 60 code of practice - gov.scot \(www.gov.scot\)](#)

steps to clarify with applicants any matter which is open to interpretation, prior to proceeding with a request (as provided for by regulation 9 of the EIRs).

34. The Commissioner requires the Authority to engage with the Applicant in terms of regulation 9 of the EIRs to ensure it has identified the correct scope of the request before issuing its review outcome.

Decision

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

Specifically, the Authority has failed to satisfy the Commissioner that it does not hold any information relevant to the Applicant's request. As a result, he finds that the Authority failed to comply with regulation 5(1) of the EIRs.

He also finds that, in failing to provide sufficient advice and assistance to the Applicant, the Authority failed to comply with regulation 9(1) of the EIRs.

The Commissioner therefore requires the Authority to engage with the Applicant (in terms of regulation 9 of the EIRs) to clarify the scope of the request; carry out adequate, proportionate searches for the information; reach a decision on the basis of those searches, and notify the Applicant of the outcome (all in terms of regulation 16 of the EIRs), by **30 August 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

16 July 2024