



Decision Notice 184/2024

Correspondence relating to a named location

Authority: Clackmannanshire Council

Case Ref: 202200709

Summary

The Applicants made a two-part request to the Authority for email correspondence between specified parties. The Authority informed the Applicants that it did not hold any information in relation to the first part of the request, and it refused to respond to the second part of the request. The Commissioner investigated and found that the Authority had failed to recognise that the information asked for was environmental information, and it had failed to properly identify, locate and consider information that it held.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 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); 5(1) (Duty to make environmental information available on request); 9(1) (Duty to provide advice and assistance); 17(1), (2)(a) and (b) (Enforcement and appeal provisions)

Background

1. On 21 April 2022, the Applicants made a request for information to the Authority. They asked for;
 - (i) All email correspondence as well as any attachments between [two named employees] from 25 June 2021 and 25 August 2021 pertaining to all properties within Gannell Hill View, Fishcross

- (ii) All email correspondence as well as any attachments between the legal department and the planning department from 12 February 2022 and 7 April 2022 pertaining to all properties within Gannell Hill View.
2. The Authority responded on 19 May 2022. In relation to part (i) of the request, the Authority told the Applicants that it held no emails that fell within scope of the request. With reference to part (ii) of the request, the Authority responded:
- I refer to my correspondence with you confirming that I have not carried out this request because I am waiting to hear back from you and the residents on whether you want to withdraw the request in exchange for the legal advice obtained from Brodies.*
3. On 27 May 2022, the Applicants wrote to the Authority requesting a review of its decision. The Applicants stated that they disagreed with the Authority's response to part (i) of their request because they believed that it did hold relevant information. The Applicants also told the Authority they were dissatisfied with its response to part (ii) of their request, they stated:
- Under no circumstances will be withdrawing this FOI request. As the [Authority's] monitoring officer, you are asking us to give up our legal rights in order for you to give us something that we are entitled to anyway.*
4. The Authority notified the Applicants of the outcome of its review on 20 June 2022. Within the review the Authority stated:
- In this case, with reference to S21(4)(a) I confirm the decision and include a clarification:*
- i) *S17 of the Freedom of Information (Scotland) Act 2002 (information not held).*
- ii) *Relates to FOIs PAR05A7856 and PAR05BB06C - Scottish Information Commissioner by letter of 8 June 2022 advised [the Authority] that these cases are deemed to be closed.*
5. On 21 June 2022, the Applicants 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 Applicants stated that they were dissatisfied with the outcome of the Authority's review because they believed that the Authority did hold information falling within the scope of part (i) of their request and they did not accept that the Authority had any valid reason to withhold information in relation to part (ii) of their request. The Applicants stressed that this current request for information did not relate to their previous FOI requests (which were referenced by the Authority in its review outcome.)

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 28 June 2022, the Authority was notified in writing that the Applicants had made a valid application. In this letter, the Authority was also notified that this application did not relate to the previous FOI's PAR05A7856 and PAR05BB06C that the Authority had referred to in its review outcome. The Authority was asked to send the Commissioner the information withheld from the Applicant.

8. 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 provide its comments on this application and the case was subsequently allocated to an investigating officer.

Commissioner's analysis and findings

9. The Commissioner has considered all of the submissions made to him by the Applicants and the Authority.

Information disclosed during the investigation

10. During the investigation, the Authority initially claimed that the Applicants had received all relevant information in relation to part (i) of the request. However, it submitted that further searches of its IT system revealed that it did hold some email correspondence within scope of this part of the request. The Authority claimed that it had since provided this correspondence to the Applicants.
11. The Authority also submitted that it had identified three emails falling within the scope of part (ii) of the request. It explained that these emails had been disclosed to the Applicants, with redactions made under section 36(1) of FOISA (confidentiality of communications).
12. The Applicants disputed the Authority's assertions that information had been disclosed in relation to both parts of the request. They submitted that they had no recollection of receiving the information and could not find any such disclosures in their records.
13. When questioned, the Authority explained that, due to the passage of time, changes in personnel and ongoing IT issues, it was unable to locate any of the correspondence it had previously claimed to have disclosed to the Applicants, and it could not provide the Commissioner with any evidence to prove that the information had been disclosed. The Authority subsequently carried out a fresh search for information and it disclosed an 84-page pdf document (containing emails) to the Applicants on 27 November 2023, subject to the redaction of information that it deemed to be outwith the scope of the request, as well as information that it was withholding under sections 36(1) and 38 of FOISA.
14. The Applicants remained dissatisfied that information was still being withheld, and they submitted that most of the unredacted information the Authority had provided (in the 84-page pdf document) comprised emails that they had either sent to or received from the Authority. The Applicants maintained that the Authority was still withholding the information they had requested.

FOISA or the EIRs?

15. During the investigation, when questioned by the Commissioner as to whether or not the Authority considered the requested information to be environmental information, the Authority confirmed that it did consider the information to be environmental.

It supplied the Commissioner with a revised set of documents, which indicated that it was now withholding information under regulation 10(4)(e) and 10(5)(d) of the EIRs, but it still listed section 38 of FOISA as its reason for withholding personal data.

The Commissioner's view on the EIRs

16. The relationship between FOISA and the EIRs was considered at length in [Decision 218/2007](#)¹. In the Commissioner's view the definition of what constitutes environmental information should not be viewed narrowly. Where the Commissioner considers a request for environmental information has not been handled under the EIRs, he is entitled (and indeed obliged) to consider how it should have been handled under that regime.
17. The Commissioner considered the subject matter of the request. The requested information is correspondence between named employees in the Planning and Building Standards team, and between the legal department and the planning department of the Authority, pertaining to properties in Gannell Hill View, Fishcross. The subject of the correspondence is the safety and maintenance of a building site in Gannell Hill View, completion of works, and the enforcement of legislation concerning the planning of development and construction of buildings. The Commissioner is satisfied that the information is environmental information in that it relates to health and safety, the built environment and the administrative measures around that, as defined in regulation 2(1) of the EIRs (paragraphs (a), (b), (c) and (f)).
18. Given that the information requested is environmental information, the Authority had a duty to consider it in terms of regulation 5(1) of the EIRs. In failing to do so, it failed to comply with regulation 5(1).

The Commissioner's comments on the Authority's handling of the request

Responding to the request and requirement for review

19. The Commissioner has significant concerns regarding the Authority's handling of the request. He notes that the original response on 19 May 2022, was issued under FOISA not the EIRs; the Authority incorrectly gave notice that information was not held in relation to part (i) of the request; it failed to respond to part (ii) of the request, instead it attempted to barter with the Applicants over their rights to the information (i.e. "if you withdraw the FOI request, we will give you a document"); and it failed to provide any advice or assistance by way of explaining why it refused to respond to part (ii) of the request.
20. By failing to provide the Applicants with any advice or assistance, the Authority failed to comply with its duties under regulation 9(1) of the EIRs, and by failing to identify any information in scope of part (i) of the request or issue a response to part (ii) of the request, the Authority also breached regulation 5(1) of the EIRs.
21. The Commissioner also notes that the Authority, in responding (incorrectly) under the terms of FOISA rather than the EIRs, failed to notify the Applicant of the relevant review, enforcement and appeal provisions.
22. The Authority is strongly advised to develop and use standard letter and email templates for responding to FOI and EIR requests and requests for review, consistent with Part 2, paragraph 9.8 of the [Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information \(Scotland\) Act 2002 and the Environmental Information \(Scotland\) Regulations 2004](#)² (the Section 60 Code).

¹ <https://www.itspublicknowledge.info/decision-2182007>

² <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

Locating and retrieving information

23. The Authority was unable to identify any information falling within scope of the request at the time of its response and in its review outcome. It subsequently identified three emails and, at a later stage during the Commissioner's investigation, identified significantly more information, some of which it stated was within scope, and some of which was out of scope of the request. The original three emails (that the Authority claimed it had identified as falling within the scope of part (ii) of the request) do not appear to be included in the additional information that was identified. Furthermore, while the Authority claimed it had provided the Applicant with redacted copies of the first three emails, it was unable to provide the Commissioner with any evidence supporting this. It is notable that the Applicants themselves, submitted that they had not received any such information from the Authority. The Commissioner has considerable concerns about the Authority's ability to conduct thorough searches and to keep records of those searches. The Commissioner is also concerned that the Authority claimed, with no evidence to support it, that it had disclosed information to the Applicants.
24. In relation to part (i) of the request, the Authority gave the Applicants notice that it held no information falling within the scope of this request. However, in the information identified at a later stage, there are documents that clearly fall within scope of the request (for example, document 2), but which the Authority has marked as out of scope, and other documents (for example, document 8) that have been identified as falling within scope and with information marked for redaction.
25. In its submissions, the Authority stated that it had difficulty locating information because of the passage of time since the request and because one of the named employees no longer worked for the Authority. The Authority also stated that there were ongoing IT issues which were impacting on its abilities to find and retrieve information. The Commissioner is not persuaded by the Authority's explanations. Section 6 of the Section 60 Code provides authorities with advice on good practice in relation to these matters, and states that authorities should maintain records of searches that are carried out in responding to requests. Paragraph 6.2.3 of the Section 60 Code, emphasises the value of keeping records of searches, in particular as evidence for reviewers and, in the event of an appeal, as evidence for the Commissioner. Had the Authority followed the advice provided in the Section 60 Code, it would not have experienced the problems it has claimed.
26. In the information that was identified by the Authority, the Commissioner notes that some information appears to be missing. For example, it is clear that in some of the emails disclosed to the Applicants, attachments or other information were referred to but were not provided to the Commissioner. This is particularly apparent in document 31, which contains a list of attachment files names (that the Authority is withholding) which do not appear to have been provided to the Commissioner for his consideration.
27. The request clearly asked for all email correspondence, including attachments. For the reasons set out above, the Commissioner is not clear which attachments have been disclosed, which have been withheld, or indeed whether all relevant attachments to email correspondence have been identified and considered.

Given this, the Commissioner is not satisfied that the Authority has identified all relevant information, as he does not consider that it has carried out sufficient and thorough searches.

Responding to the Commissioner

28. The Commissioner has substantial concerns about the poor quality of submissions from the Authority, in particular, the lack of detail or clear explanation in the responses to the Commissioner's questions.
29. He notes that section 11 of the Section 60 Code contains advice for Authorities in providing submissions and comments to the Commissioner in relation to appeals. The Commissioner urges the Authority to properly consider the advice given in paragraph 11.1.2 before providing comments or submissions for any appeal in future.
30. Within the second bundle of withheld information provided to the Commissioner, the Authority has included internal correspondence, in which information within scope of the request has been forwarded to the case handler for this appeal. For information to fall within the scope of an information request, it must be held by the Authority at the time the request is received; it does not extend to discussions generated after the request is received.
31. To supplement section 11 of the Code, the Commissioner publishes a [guide for Scottish public authorities](#)³ on what to expect during the investigation of an appeal. This guide provides advice on how to mark up the withheld information, how to complete the withheld information schedule and how to send the withheld information to the Commissioner. This guide has been provided to the Authority on numerous occasions. Despite this, the Commissioner is extremely disappointed that the Authority continues to fail in providing the withheld information in the manner specified in his guide, or indeed in any coherent format. The withheld information provided by the Authority to the Commissioner on 22 January 2024, contains, in addition to the documents discussed in paragraph 30, other information incorrectly marked as out of scope and duplicates of documents (including emails in chains) that have not been considered and marked or excluded in accordance with the guide.
32. It is a matter of fact that the Authority was late in providing the submissions and withheld information requested by the Commissioner on 7 December 2023. The Authority had not asked for an extension to the original timescale, and no reasons were given for the late provision of this information. The Commissioner is concerned that this is indicative of the level of importance the Authority attaches to compliance with FOI legislation and communications with his Office.

Learning lessons

33. Since 2020, the Commissioner has published 17 appeal decisions in relation to requests made to this Authority. In each of these decisions, the Commissioner has identified that the Authority has failed to comply with FOI law in some way (as specified in each decision). There are some recurring issues, however, such as the failure to provide sufficient advice and assistance to requesters, the failure to carry out adequate searches, the failure to keep records of information that is or is not disclosed, and the failure to provide requesters with notification of their appeal rights at, variously, response or requirement for review stage. The Commissioner is extremely concerned that the Authority does not appear to have given any consideration to his advice in previous decisions.
34. Indeed, in [Decision 139/2022](#)⁴, the Commissioner expressed his deep concern with apparent systemic failures by the Authority in terms of its handling of requests for information. The

³ <https://www.itspublicknowledge.info/sites/default/files/2023-03/InvestigationsGuideforSPAs2023.pdf>

⁴ <https://www.itspublicknowledge.info/decision-1392022>

Commissioner notes that his previous concerns, expressed in Decision 139/2022, do not appear to have prompted the Authority to address these apparent systemic failures. The Commissioner will be launching an intervention with the Authority, in order to improve its practice and prevent applicants from having their FOI rights breached repeatedly.

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 Applicants.

The Authority failed to comply with regulation 5(1) of the EIRs by;

- failing to identify the information covered by the request as Environmental Information for the purposes of the EIRs,
- failing to identify, locate, retrieve and properly consider all of the information that fell within scope of both parts of the request, and
- failing to respond to part (ii) of the request.

By failing to provide advice and assistance to the Applicants the Authority failed to comply with regulation 9(1) of the EIRs.

The Commissioner requires the Authority to carry out thorough and comprehensive searches for the information requested, and to properly consider all of the information within scope of the Applicants' request. The Commissioner requires the Authority to issue a new review outcome to the Applicants, either disclosing any further information identified and located or notifying the Applicant why the information cannot be provided under a provision in the EIRs.

The Authority must carry out these steps and notify the Applicant of the outcome of its review, by **17 October 2024**.

Appeal

Should either the Applicants 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.

Euan McCulloch
Head of Enforcement

2 September 2024