



Scottish Information
Commissioner
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Decision Notice 274/2024

Property information

Applicant: The Applicant

Authority: City of Edinburgh Council

Case Ref: 202400620

Summary

The Applicant asked the Authority for communications between the Authority's officials and personnel of a named company concerning the sale of land, property development and planning applications relating to the former "Smithies" public house at 49-51 Eyre Place and the adjacent land. The Authority disclosed some information but withheld other information it considered was commercially sensitive. The Commissioner investigated and found that the Authority had breached the EIRs in responding to the request as it was not entitled to withhold information (which it subsequently disclosed during the investigation) under the exception claimed. However, he was satisfied the Authority did not hold any further information that fell within the scope of the Applicant's request.

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); 10(1) and (5)(e) (Exceptions from duty to make environmental information available); 17(1), (2)(a),(b) and (f) (Enforcement and appeal provisions)

Background

1. On 14 January 2024, the Applicant made a request for information to the Authority. He asked for:

“copies of all communication and correspondence, including letters, emails, meeting minutes, notes of meetings and other electronic communications between [the Authority’s] officials and [named persons] and other principals, staff, contractors and representatives of Eyre Place Properties Ltd. during the years 2021, 2022 and 2023 concerning the sale of land, property development and planning applications relating to the former ‘Smithies’ public house at 49-51 Eyre Place and the adjacent land 20m north east of 74 Eyre Place, Edinburgh.”
2. The Authority responded on 12 February 2024, advising the Applicant that it would require an additional 20 working days to respond, as permitted by regulation 7(1) of the EIRs.
3. On 19 March 2024, the Authority issued its substantive response to the Applicant – seven working days beyond the extended time permitted by regulation 7(1) of the EIRs. The Authority provided some information to the Applicant, but withheld other information under the exceptions in regulations 10(5)(e) and 11(2) of the EIRs.
4. On 28 March 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision for the following reasons:
 - the length of time the Authority had taken to respond to his request
 - he disagreed with the Authority’s application of the exception in regulation 10(5)(e) to withhold information
 - a significant amount of information appeared to have not been identified or provided by the Authority.
5. The Authority notified the Applicant of the outcome of its review on 21 April 2024. In its review outcome, the Authority:
 - accepted that there were excessive delays, that the request did not warrant being extended under regulation 7 of the EIRs and that it should and could have been dealt with within the statutory 20 working days
 - stated that it had withheld very little information, with all redactions visible and with no documents being withheld in their entirety
 - upheld its application of the exception in regulation 10(5)(e) of the EIRs.
6. On 1 May 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 he was dissatisfied with the outcome of the Authority’s review for the following reasons:
 - he was still not satisfied that the Authority had identified and provided him with all relevant information falling within the scope of his request
 - he disagreed with the Authority’s application of the exception in regulation 10(5)(e) to withhold information.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 29 May 2024, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information, and the case was subsequently allocated to an investigating officer.
9. 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.
10. During the investigation, the Authority disclosed to the Applicant the information it had withheld under the exception in regulation 10(5)(e) of the EIRs as it no longer considered it to be commercially sensitive.
11. The Applicant did not challenge the Authority's reliance on the exception in regulation 11(2) of the EIRs, so the Commissioner will not consider this further in his decision.

Commissioner's analysis and findings

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

Application of the EIRs

13. Having considered the withheld information (which relates to a specified planning application), the Commissioner is satisfied that the information sought by the Applicant is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs (in particular, paragraphs (a) and (c) of that definition).
14. The Applicant has not disputed the Authority's decision to handle the request under the EIRs and the Commissioner will consider the information in what follows solely in terms of the EIRs.

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

15. 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 held by the authority when it receives a request.
16. 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.
17. The standard of proof to determine whether a Scottish public authority holds the information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.

18. The Commissioner also considers, where appropriate, any reasons offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant information is (or was, at the time the request was received) held by the public authority.

The Applicant's submissions

19. The Applicant was concerned that all the information falling within his request was not identified by the Authority and he explained why. Despite his request relating to the sale of a parcel of land owned by the Authority, he considered that the information supplied by the Authority contained "very limited or no information or correspondence" concerning:
- the land sale process, including legal or contractual aspects, sales advertising, competitive sale vs direct award processes, draft/proposed contract conditions, phasing timetable/longstop date etc.
 - neighbour notification and consultation
 - complaints handling.
20. The Applicant added that the land sale in question was subject to numerous formal complaints to the Authority by residents and MSP/MP correspondence with the Authority's Chief Executive. He also referred to the Authority – and relevant councillors and the developers – being made aware that a submission had been made to the Scottish Public Services Ombudsman regarding the case.
21. The Applicant commented that his main concern was that the Authority appeared to have misinterpreted the wording of his request, which was not limited to specific individuals. He emphasised that his request sought "copies of all communication and correspondence, including letters, emails, meeting minutes, notes of meetings and other electronic communications between [the Authority's] officials and [named persons] *and other principals, staff, contractors and representatives of Eyre Place Properties Ltd*". [emphasis added]
22. The Applicant added that he would also have expected to see copies of correspondence between the Authority and *all* representatives of Eyre Place Properties Ltd, not just the named individuals – and especially with any legal representatives of Eyre Place Properties Ltd (albeit with relevant redaction).

The Authority's submissions

23. During the investigation, the Authority was asked to explain how it had established what recorded information was covered by the request and to describe the searches carried out, including the records which were searched and any keywords and other search parameters used.
24. The Authority explained that it had contacted its Planning and Estates departments and discussed the request with the respective officers assigned to the project in question. Those officers advised that, as part of business-as-usual processes, all the relevant information relating to the sale of Authority-owned land and subsequent planning development was held within a "case management folder" as a "full set of information" was required to be retained at a service level. As a result, the Authority stated there was no reasonable need to extend the search beyond this to identify the information within scope of the request.

25. The Authority clarified that its reference to a “full set of information” meant all the information that was required for business purposes. It also confirmed that all communication and correspondence, including letters, emails, meeting minutes, notes of meetings and other electronic communications” would have been retained to the case management folder, and that the officers assigned to the project in question were the only officials of the Authority who had communicated with Eyre Place Properties Ltd in relation to the matter specified in the request.
26. During the investigation, the Authority was asked to comment on the specific points raised by Applicant on why he considered it held more information than it had identified and disclosed in response to his request.
27. The Authority confirmed that all information in scope had been provided. It explained that information relating to the sale was discussed in public at the Authority’s Finance and Resource Committee, and all planning matters, including neighbour notification and consultation, were in the public domain.
28. The Authority suggested that the Applicant may have felt the scope of his request was wider than it was. It explained that it interpreted the request in line with the specific terms of the request, which asked for communication and correspondence between the Authority’s officials and named persons (and other principals, staff, contractors and representatives) of Eyre Place Properties Ltd.
29. The Authority noted that it was aware of ongoing complaints. However, given its above interpretation, it considered that information fell outwith the scope of the request. It also explained that there may have been communication between Authority officials, which it also considered would have fell outwith the scope of the request.
30. The Authority was asked to clarify further the type of information it had excluded as not following within the scope of the request, but that may have been expected by the Applicant (as suggested by the dissatisfaction expressed in the Applicant’s application to the Commissioner) to have fallen within the scope of his request.
31. The Authority responded that it interpreted the request as seeking communications between officials of the Authority and persons (not limited to those specifically named) of Eyre Place Properties Ltd between the dates specified in the request only. It considered the following information fell outwith the scope of the request:
 - any internal emails (e.g. communications between officials of the Authority)
 - any information (if held) relating to discussion of any complaint
 - any internal correspondence of a legal nature
 - recorded information that related to other third parties (i.e. not to those involved with Eyre Place Properties Ltd).
32. The Authority confirmed that no other correspondence or communications from “other principals, staff, contractors and representatives of Eyre Place Properties Ltd” was omitted from its searches, which included all the terms in the request, all of the named specified and Eyre Place Properties Ltd to ensure completeness.

The Commissioner's view

33. The Commissioner has taken account of the submissions provided by the Applicant, in which he explained why he believed that the Authority held further information falling within the scope of his request.
34. Having closely considered the terms of the request and the submissions provided by the Authority, the Commissioner is satisfied that the Authority's interpretation of the request was reasonable.
35. The Commissioner also accepts that the Authority took adequate and proportionate steps to establish the information it held which fell within the scope of the request and he is satisfied, on balance, that it does not (and did not, on receipt of the request) hold any further relevant information. He considers that the Authority's searches were reasonable in the sense of those tasked to carry them out and the locations searched.
36. Having considered the case in detail, in particular the submissions provided by the Authority and the subject matter and scope of the request, the Commissioner is satisfied that the Authority does not (and did not, at the time the request was received) hold any further recorded information. While the Applicant believed and expected further information to be held by the Authority, the Commissioner is satisfied that this was not the case.
37. In all the circumstances, therefore, the Commissioner is satisfied, on the balance of probabilities, that the Applicant has received all the information held by the Authority that falls within the scope of his request. He therefore finds that, in this respect, the Authority complied with regulation 5(1) of the EIRs in responding to the request.

Regulation 10(5)(e) of the EIRs – confidentiality of commercial or industrial information

38. Regulation 10(5)(e) provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
39. In responding to the Applicant, both initially and on review, the Authority withheld information under regulation 10(5)(e) (which relates to the confidentiality of commercial or industrial information) of the EIRs. During the investigation, the Authority supplied the Applicant with all the information it had withheld under regulation 10(5)(e) of the EIRs.
40. In the absence of an explanation from the Authority as to why this information was justifiably excepted from disclosure when the Authority originally responded to the request, and subsequently reviewed its initial refusal, but was no longer excepted and therefore able to be disclosed during the investigation, the Commissioner finds that the Authority failed to comply regulation 5(1) of the EIRs by not disclosing this information sooner.
41. Given that the Authority has now disclosed this information to the Applicant, the Commissioner does not require any action from the Authority in respect of this failure.

Decision

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

The Commissioner finds that the Authority complied with regulation 5(1) of the EIRs in identifying all the information that fell within the Applicant's request.

However, the Commissioner finds that the Authority failed to comply with regulation 5(1) of the EIRs by wrongly withholding information under the exception in regulation 10(5)(e).

Given that the Authority has now disclosed the information it had wrongly withheld under the exception in regulation 10(5)(e) of the EIRs, the Commissioner does not require the Authority to take any action in respect of this failure in response to the Applicant's application.

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.

David Hamilton
Scottish Information Commissioner

26 November 2024