

Decision Notice



Decision 065/2012 Ms Patricia Forrester and City of Edinburgh Council

Public Footpaths

Reference No: 201102132
Decision Date: 5 April 2012

www.itspublicknowledge.info

Margaret Keyse

Acting Scottish Information Commissioner

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Summary

Ms Forrester requested from the City of Edinburgh Council (the Council) information in respect of complaints/accidents reported by members of the public relating to the public footpath/pavement within the vicinity of a locus, findings of any inspections and actions deemed necessary, and details of maintenance and resurfacing of the public footpath/pavement of the locus etc. The Council responded under regulation 8 of the EIRs by charging £34.50 to comply with the request. Following a review, Ms Forrester remained dissatisfied with the Council's decision to deal with her request under the EIRs, and applied to the Commissioner for a decision.

Following an investigation, which considered only whether the Council had correctly identified the request as one seeking environmental information, the Commissioner found that the Council had dealt with Ms Forrester's request for information in accordance with the EIRs. She found that it had correctly identified the requested information as environmental information in terms of regulation 2(1), and so had appropriately dealt with it in terms of the EIRs.

The Commissioner found that the requested information exempt from disclosure under section 39(2) of FOISA, and so the Council did not act in breach of Part 1 of FOISA by refusing to disclose the information in terms of FOISA.

The Commissioner did not require the Council to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (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) (Interpretation – parts (a), (b), (c) and (f) of the definition of environmental information); 5(1) (Duty to make environmental information available on request)

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.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.



Background

1. On 28 July 2011, solicitors acting on behalf of Ms Forrester wrote to the Council requesting the following information:
 - Details of all complaints/accidents reported to the Council by members of the public relating to the public footpath to the beach from the car park at Portobello from 24 June 2010 to date.
 - Details of findings of any inspections and what action was deemed necessary in relation to the same.
 - Details of maintenance and resurfacing of the public footpath of the locus from 24 June 2010 to date.
 - Details of the Council's maintenance contractors and records relating to maintenance of the locus
2. Subsequent references to correspondence to and from Ms Forrester should be read as including correspondence to and from her solicitors on her behalf.
3. The Council responded on 4 August 2011. It explained that the request for information was being dealt with under the EIRs, and that under regulation 8 of the EIRs public authorities can make a charge for providing information. The Council calculated that the total cost of complying with Ms Forrester's request was £34.50, and explained that this was calculated as staff time (2 hours at £13 per hour, £26), plus reproduction costs (20 pages at £0.15 per page, £3.00) plus information retrieval (0.5 hours at £13 per hour, £6.50).
4. On 5 September 2011, Ms Forrester wrote to the Council requesting a review of its decision. In particular, Ms Forrester was dissatisfied that her request had been processed under the EIRs as opposed to FOISA. She maintained that she was not seeking environmental information in terms of regulation 2 of the EIRs, and so it was inappropriate for the Council to treat the request as one made under the EIRs.
5. The Council notified Ms Forrester of the outcome of its review on 7 September 2011. The Council advised Ms Forrester that the information she sought clearly fell under the provisions of the EIRs, and that consequently the Council was entitled to process the request under the EIRs, notwithstanding her preference that it was considered under FOISA.
6. On 8 November 2011, Ms Forrester wrote to the Commissioner, stating that she was dissatisfied with the outcome of the Council's review and applying 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 certain specified modifications.



7. The application was validated by establishing that Ms Forrester had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.
8. On 8 December 2011 the Council was notified of the valid application and was asked to provide a representative sample of the information withheld. The Council did so on 11 January 2012. The case was then allocated to an investigating officer.

Investigation

9. The investigating officer contacted the Council on 18 January 2012, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA, read with regulation 17 of the EIRs) and asking it to respond to specific questions. In particular, the Council was asked to explain in detail why it regarded the withheld information as falling within the definition of environmental information.
10. The Council responded on 7 February 2012.
11. The Commissioner's decision considers, in accordance with Ms Forrester's application, whether the information held by the Council falling within the scope of these requests is environmental information. The Commissioner has made no determination about the costs applied by the Council, as this matter was not raised in Ms Forrester's application.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered the sample of the withheld information provided by the Council and all of the submissions made to her by both Ms Forrester and the Council, and is satisfied that no matter of relevance has been overlooked.

Section 39(2) of FOISA – environmental information

13. The previous Commissioner set out his thinking on the relationship between FOISA and the EIRs in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹ and need not repeat it in full here. However, the Commissioner will reiterate some of the key points:
 - The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition of environmental information in the EIRs.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>



- There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
 - Any request for environmental information therefore must be dealt with under the EIRs.
 - In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
14. In the present case, the Council submitted that it was entitled to withhold the information requested, as environmental information, under section 39(2) of FOISA. For this exemption to apply, any information requested would require to be environmental information as defined in regulation 2(1) of the EIRs, the relevant paragraphs of which are reproduced in the Appendix below.
15. Ms Forrester submitted that the information she sought was not environmental in terms of regulation 2 of the EIRs and considered it inappropriate for the Council to attempt to treat her request as having been made under the EIRs.
16. The Council submitted that the request specified information relating to the condition and maintenance of a section of public walkway from the car park at the funfair at Portobello to the beach. Given the terms of the request, the Council considered that the requested information would fall within the definition of environmental information set out in regulation 2(1) of the EIRs, specifically paragraphs (a), (c) and (f) of that definition.
17. The Council highlighted that the subject matter of Ms Forrester's request concerns measures and activities affecting, or likely to affect, the state of the environment (in particular soil, land and landscape and natural sites) and factors (such as substance and waste). For example, when carrying out a walkabout inspection or a main route inspection, the road inspector is looking to identify defects to land which may have been caused by the elements of the environment. Therefore, the information held within these documents falls within paragraph (a) of the definition.
18. The Council also stated that the requested information is an example of measures which the Council has adopted to correct any defects which may occur due to the elements of the environment. Therefore the information also falls within paragraph (c) of the definition.
19. The defect report details any defects such as potholes, a situation which impacts on the condition of land and how this would affect human safety. Furthermore, the Council stated, the "Clarence Job Ticket" details any complaints and or accidents which have been reported, which again affect human safety; therefore, the information falls within paragraph (f) of the definition.
20. Having considered the nature of the withheld information and the submissions made by the Council, the Commissioner is satisfied that the requested information comprises of environmental information as defined within regulation 2(1) of the EIRs.



21. This is in line with the reasoning of the previous Commissioner in similar cases where the information relating to inspection of roads was held to fall within the terms of the EIRs, for example *Decision 229/2011 Mr Dougall Campbell and Glasgow City Council*² where it was decided that details of the training, guidance, limits and examples provided to local authority inspectors to assist, guide or train them in identification and correct classification of defects to the pavement, road surface or street furniture on a named road fell within the EIRs.
22. Similarly, in another case, *Decision 027/2012 David Cardwell and Dundee City Council*³, the previous Commissioner decided that similar information (inspection records, defects, etc. for a pavement) was environmental information.
23. 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 such information to be considered in terms of the EIRs. In this case, the Commissioner accepts that the Council was entitled to apply the exemption to the requested information, given her conclusion that it is properly considered to be environmental information.
24. This exemption 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 the applicant in this case, the Commissioner also accepts that the public interest in maintaining this exception and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA.

DECISION

In respect of the matters specified in Ms Forrester's application for decision, the Commissioner finds that the City of Edinburgh Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Ms Forrester.

The Commissioner finds that by identifying the information requested as environmental information as defined by regulation 2(1) of the EIRs, the Council complied with the EIRs in responding to the information request made by Ms Forrester as one made under the EIRs.

Since the Commissioner is satisfied that the requested information was exempt from disclosure under section 39(2) of FOISA, she finds that the Council did not breach of Part 1 of FOISA by refusing to disclose the information in terms of FOISA.

²<http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2011/201101215.asp>

³<http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2012/201101257.asp>

Decision 065/2012
Ms Patricia Forrester
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Appeal

Should either Ms Forrester or the City of Edinburgh Council wish to appeal against this decision, there is an 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 notice.

Margaret Keyse
Acting Scottish Information Commissioner
5 April 2012



Appendix

Relevant statutory provisions

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.

...

- (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

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- (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) factors, 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;
- ...
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

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.