

Decision Notice



Decision 068/2012 Mrs Anne Ewen and the City of Edinburgh Council

Accidents at a specified public footpath, etc.

Reference No: 201101774
Decision Date: 12 April 2012

www.itspublicknowledge.info

Margaret Keyse

Acting Scottish Information
Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS



Summary

Mrs Anne Ewen (Mrs Ewen) asked the City of Edinburgh Council (the Council) for information on complaints or accidents reported by members of the public in relation to a specific public footpath and for details of maintenance work, etc. carried out to the footpath. The Council dealt with the request under the Environmental Information (Scotland) Regulations 2004 (the EIRs) and issued a fees notice for £177. Mrs Ewen was unhappy that the Council had dealt with her request under the EIRs, and asked it to review its decision to do so. Following a review, Mrs Ewen remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the information requested by Mrs Ewen (and held by the Council) was environmental information for the purposes regulation 2(1) of the EIRs. As such, she determined that the Council had been entitled to deal with the request under the EIRs.

Relevant statutory provisions and other sources

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), (c) and (f) of the definition of environmental information); 5(1) and (2)(a) (Duty to make environmental information available on request); 8(1) and (3) (Charging)

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 20 July 2011, solicitors acting on behalf of Mrs Ewen wrote to the Council requesting the following information:
 - details of all complaints or accidents reported to the Council by members of the public relating to the public footpath or pavement within the vicinity of Colinton Road at the junction with Gray's Loan, Edinburgh from 1 January 2010 to the date of the request (request 1);
 - details of the findings of any inspections and what action was deemed necessary in relation to the same (request 2);
 - details of maintenance and resurfacing of the public footpath or pavement from 1 January 2010 to the date of the request (request 3);
 - details of the Council's maintenance contractors and records relating to maintenance of the public footpath or pavement (request 4);
 - details of the frequency at which inspection requires to be carried out at the public footpath or pavement (request 5);
 - details of the classification of the public footpath for inspection and maintenance purposes (request 6); and
 - a copy of the memo issued in response to a letter sent by the solicitors (unnumbered, request 7).
2. Subsequent references to correspondence to and from Mrs Ewen should be read as being to correspondence to and from her solicitors on her behalf.
3. The Council responded on 4 August 2011. It advised Mrs Ewen that it was dealing with the request under the EIRs, and issued a fees notice for £177 under regulation 8 of the EIRs.
4. On 8 August 2011, Mrs Ewen wrote to the Council, requesting a review of its decision. She advised the Council that she was not seeking environmental information in terms of regulation 2(1) of the EIRs, and that she considered it inappropriate for the Council to treat her request as having been made under the EIRs. Mrs Ewen asked the Council to confirm that they would deal with her request under the Freedom of Information (Scotland) Act 2002 (FOISA).



5. The Council notified Mrs Ewen of the outcome of its review on 8 September 2011, and upheld its initial decision. The Council referred Mrs Ewen to the definition of environmental information in Article 2(1) of European Directive 2003/4/EC on public access to environmental information (on which the EIRs are based); to a previous decision of the Commissioner (*Decision 037/2011 David McLaughlin and South Ayrshire Council*¹) and to guidance issued by the Commissioner.
6. The Council also referred Mrs Ewen to the exemption in section 39(2) of FOISA, which provides, in effect, that environmental information is exempt from disclosure under FOISA, thereby allowing such information to be considered solely in terms of the EIRs.
7. On 22 September 2011, Mrs Ewen 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.) Mrs Ewen disagreed that the inspection and maintenance records for a public thoroughfare comprise environmental information.
8. The application was validated by establishing that Mrs Ewen 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. The case was then allocated to an investigating officer.

Investigation

9. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to explain why it considered the withheld information to be environmental information for the purposes of the EIRs.
10. The Council provided submissions on 1 November 2011 and 7 December 2011, and provided a sample of the withheld information for requests 1, 2 and 5.
11. The Council advised the Commissioner that, for request 3, no resurfacing of footways took place at the junction during the requested period. For request 4, the Council explained that all maintenance at the junction was carried out by its Roads Services department.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2011/201001797.asp>



12. The Council stated that, without carrying out a full search of its systems, it was not possible to say whether it held any information that fell within these requests. The Council explained that, in most cases, information *would* be held for such requests. However, in this case, the Council only became aware that it did not hold any information falling within requests 3 and 4 when it had been asked to provide a sample of documents to the Commissioner, in order to allow the Commissioner to determine whether the information in question was environmental information for the purposes of the EIRs.
13. In relation to request 6, which asked how the footpath was classified for inspection purposes, the Council advised the Commissioner that it does not use road or section numbers, and that locations are indicated by utilising lampposts and or addresses as reference. The Council wrote to Mrs Ewen on 7 December 2011 to tell her that this was the case.
14. At the same time, the Council also wrote to Mrs Ewen to explain, in relation to request 7, that the letter in question had been forwarded on to the relevant parties without any covering memo. The Council therefore provided Mrs Ewen with what it described as a formal refusal notice under regulation 10(4)(a) of EIRs, on the basis that it did not hold the information, although only in relation to requests 6 and 7. The Commissioner contacted Mrs Ewen on 21 December 2011, inviting comments on the letter from the Council of 7 December 2011, but no comments were made.
15. The Commissioner's investigation will consider, in line with Mrs Ewen's application, whether the information held by the Council, and falling within remaining requests, is environmental information for the purposes of the EIRs. The Commissioner has therefore made no determination as to whether all of the information sought by Mrs Ewen is held by the Council or whether the fees notice issued by the Council was reasonable, as these matters were not raised in Mrs Ewen's application.

Commissioner's analysis and findings

16. In coming to a decision on this matter, the Commissioner has considered the sample of the withheld information provided by the Council and the submissions made to him by both Mrs Ewen and the Council, and is satisfied that no matter of relevance has been overlooked.

Section 39(2) of FOISA – environmental information

17. 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*² and need not repeat it in full here. However, the Commissioner will reiterate some of the key points:

² <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>



- (a) The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition of environmental information in the EIRs.
- (b) 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.
- (c) Any request for environmental information therefore must be dealt with under the EIRs.
- (d) In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).

Is the information environmental information?

- 18. In the present case, the Council submitted that it was entitled to withhold the information requested under section 39(2) of FOISA, on the basis that it was environmental information as defined in regulation 2(1) of the EIRs.
- 19. However, Mrs Ewen submitted that the information was *not* environmental information as defined by regulation 2(1) of the EIRs.
- 20. The Council submitted that the information would fall within definitions (a), (c) and (f) of environmental information and supplied six samples of information, which it believed fell within the scope of Mrs Ewen's requests.
- 21. The sample information provided was in written and visual form and included what can be described as reports, maps, and guidance. Having viewed this information, the Commissioner is satisfied that the samples are representative of the information held by the Council which falls within the scope of Mrs Ewen's requests.
- 22. The Council had referred to *Decision 037/2011* in its review response to Mrs Ewen. The Commissioner asked the Council if the differences in the information for that case and the present application were relevant, given that *Decision 037/2011* concerned a footpath beside a river, whilst Mrs Ewen's application related to an urban street setting.
- 23. The Council replied that *Decision 037/2011* was relevant, given that the information in that case, and in the current case, related to inspection and maintenance records of a footpath. The Council considered the content of the two requests to be similar, although the locations of the footpaths were different. Mrs Ewen was invited by the Commissioner to comment on the applicability of *Decision 037/2011* to her request, but did not do so.
- 24. The Council submitted that the subject matter of Mrs Ewen's request concerned 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 substances and waste). The Council explained that, for example, when carrying out a walkabout inspection or a main route inspection, the Council road inspector would be looking to identify defects to land which may have been caused by the elements of the environment. Therefore, according to the Council, the information it held fell within paragraph (a) of the definition of environmental information.



25. The Council also submitted that its inspection and assessment procedures contain policies and measures which were designed to correct any defects which may occur due to the elements of the environment. Therefore, according to the Council, paragraph (c) was also relevant. The Council provided examples of defects as a missing manhole cover, a defective bollard and barriers still lying at the bus stop as situations which impact on the condition of land and how this would affect human safety. As a result, the Council also took the view that the information fell within paragraph (f) of the definition of environmental information.
26. The Commissioner has considered the submissions made by the Council on the definition of environmental information and has concluded that, as the requested information concerned the condition of a pavement (including responsibility for its repair and maintenance), it related to measures (the Council's policy of conducting inspections of pavements and recording the outcome of these inspections and its responsibilities) and activities (the Council's responsibilities in terms of the Roads Act 1984) affecting or likely to affect the elements referred to in part (a) of the definition of environmental information, in particular land and landscape. As such, the Commissioner is satisfied that the information withheld by the Council is environmental information as defined in part (c) of the definition.
27. The Commissioner also notes that, in respect of paragraph (f), *The Aarhus Convention: An Implementation Guide*³ states in its consideration of the definition that:
- “Built structures’ refers to man-made constructions. It is not limited to large buildings and objects such as dams, bridges, highways, etc. but also covers small constructions, and even landscaping or other transformation of the natural environment.”
28. Having considered the nature of the withheld information, the Commissioner is satisfied that it comprises environmental information as defined within regulation 2(1) of the EIRs.
29. This finding is in line with the reasoning of the previous Commissioner in similar cases where information relating to the inspection of roads has been held to fall within the terms of the EIRs, e.g. *Decision 229/2011 Mr Dougall Campbell and Glasgow City Council*⁴ 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 the correct identification and correct classification of defects to the pavement, road surface or street furniture on a named road fell was environmental information for the purposes of the EIRs.
30. Similarly, in another recent case, *Decision 027/2012 David Cardwell and Dundee City Council*⁵, the Commissioner decided that pavement inspection records were environmental information for the purposes of the EIRs.

³ <http://www.unece.org/fileadmin/DAM/env/pp/acig.pdf>

⁴ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2011/201101215.asp>

⁵ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2012/201101257.asp>



Section 39(2) of FOISA – environmental information

31. As noted above, a Scottish public authority must deal with a request for environmental information under the EIRs: if it fails to do so, the Commissioner would have to find that the authority failed to comply with regulation 5(1) of the EIRs.
32. 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 any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Council was entitled to apply the exemption to the withheld information, given her conclusion that the information is environmental information.
33. The exemption in section 39(2) 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 Mrs Ewen in this case, the Commissioner has also concluded that the public interest in maintaining this exemption, and in dealing with the request in line with the EIRs, outweighs the public interest in disclosure of the information under FOISA.

Other matters

34. As noted elsewhere in this decision, during the investigation, it became clear that the Council did not hold information in respect of certain of Mrs Ewen's requests. The only issue raised by Mrs Ewen at review stage and in her application to the Commissioner was whether the information held by the Council was environmental information for the purposes of regulation 2(1) of the EIRs. As such, the Commissioner does not have the power to determine whether the Council does (or does not) hold the information or to determine whether the fees notice issued by the Council is reasonable in terms of regulation 8(3) of the EIRs. As the Commissioner has noted in guidance on charging fees under regulation 8 of the EIRs⁶, authorities are not entitled to charge for time spent determining whether information is actually held. Given that it only came to light during the investigation that the Council did not hold certain information, the Commissioner would ask the Council to ensure that the fees notice issued to Mrs Ewen does not include any fees related to the production of information which it does not in fact hold.

⁶ <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=4906&SID=105> (page 7)



DECISION

The Commissioner finds that the City of Edinburgh Council (the Council) was entitled to deal with Mrs Ewen's requests as being for environmental information as defined in regulation 2(1) of the Environmental Information (Scotland) Regulations 2004 (the EIRs). As such, the Council complied with the EIRs and (by applying the exemption at section 39(2) of the Freedom of Information (Scotland) Act 2002 (FOISA)) with FOISA, in responding to Mrs Ewen's requests.

Appeal

Should either Mrs Ewen or the 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
12 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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (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 –
 - (a) the provision does not confer absolute exemption; and
 - (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

-

(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;

...

(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.

(2) The duty under paragraph (1) –

(a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and

...



8 Charging

(1) Subject to paragraphs (2) to (8), where a Scottish public authority is under a duty to make environmental information available under regulation 5(1), it may charge a fee for so doing.

...

(3) Fees charged under paragraph (1) shall not exceed a reasonable amount and in any event shall not exceed the costs to the authority of producing the information requested.