

Decision Notice



Decision 213/2012 Mr James Proctor and Ms Freya Lees and the City of
Edinburgh Council

Copy of surveyor's report

Reference No: 201202012
Decision Date: 18 December 2012

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Rosemary Agnew
Scottish Information Commissioner

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Summary

Mr Proctor and Ms Lees asked the City of Edinburgh Council (the Council) for a surveyor's report for a specified address. The Council disclosed copies of statutory notices relating to the address, but not the surveyor's report.

Following an investigation, the Commissioner was satisfied that the Council did not hold the surveyor's report. While she found that the Council had breached the EIRs by failing to notify Mr Proctor and Ms Lees that it did not hold the report, she 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) (definitions (a) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available); 13(b) and (c) (Refusal to make information available)

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.

Background

1. On 25 April 2012, Mr Proctor and Ms Lees wrote to the Council asking, among other information, for a copy of a property conservation surveyor's report detailing the scope of repairs required at a specified address and the justification for those repairs.
2. The Council did not respond to this request and, on 4 June 2012, Mr Proctor and Ms Lees wrote to the Council asking it to review its failure to respond.
3. The Council did not respond to the requirement for review within the timescales set down in section 20(1) of FOISA. On 23 July 2012, Mr Proctor and Ms Lees applied to the Commissioner for a decision on the Council's failure to respond to their requirement for review.



4. The Council then carried out a review and notified Mr Proctor and Ms Lees of the outcome on 7 August 2012. The Commissioner subsequently issued a decision (*Decision 157/2012 Mr James Proctor and Ms Freya Lees and the City of Edinburgh Council*) on 11 September 2012 in respect of the breach of the technical requirements of FOISA and the EIRs in the Council's handling of the request.
5. In its review response, the Council provided Mr Proctor and Ms Lees with copies of two statutory notices detailing work required to be carried out at the specified property.
6. On 5 October 2012, Mr Proctor and Ms Lees wrote to the Commissioner, stating that they were 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.) Mr Proctor and Ms Lees were dissatisfied with the Council's failure to provide the surveyor's report they had requested.
7. The application was validated by establishing that Mr Proctor and Ms Lees 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

8. 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 justify why it considered the provision of the statutory notices to Mr Proctor and Ms Lees would fulfil the terms of the information request. Additionally, the Council was asked to explain the searches that had been undertaken in order to locate and retrieve the information Mr Proctor and Ms Lees had sought. The Council was also asked whether it wished to apply the exemption in section 39(2) of FOISA to the requested information, given that it comprised environmental information.
9. The Council responded on 6 November 2012, explaining that the surveyor's report requested by Mr Proctor and Ms Lees did not exist. The Council also confirmed that it wished to apply the exemption in section 39(2) of FOISA.
10. In subsequent correspondence with the Council, the investigating officer asked it to explain the process by which information was gathered in order to identify repair work that was required at a property which was the subject of a statutory notice, and to confirm whether any additional searches had been carried out in order to identify and retrieve the specific information sought by Mr Proctor and Ms Lees.



11. The Council subsequently provided an explanation of this process and again confirmed that it did not hold the specific information sought by Mr Proctor and Ms Lees.
12. The relevant submissions received from both Mr Proctor and Ms Lees and the Council will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner has considered the submissions made to her by both Mr Proctor and Ms Lees and the Council and is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

14. It is clear from the Council's correspondence with Mr Proctor and Ms Lees and the Commissioner that it considered the information requested was environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns repairs to buildings under the statutory notice regime and the Commissioner is satisfied that it falls within either paragraph (a) or paragraph (c) of the definition of environmental information contained in regulation 2(1) of the EIRs, being information on the state of the elements of the environment, or on measures and activities affecting or likely to affect the state of those elements.

Section 39(2) of FOISA – environmental information

15. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1)) 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 it is properly classified as environmental information.
16. 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 exemption and in dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.

Whether the requested information is held by the Council?

17. In this case, the specific information being sought by Mr Proctor and Ms Lees was a copy of a surveyor's report detailing the repairs required at a specified property.
18. As noted above, in its response to their requirement for review, the Council disclosed copies of two statutory notices to Mr Proctor and Ms Lees providing details of work requiring to be carried out in order to remedy defects at the specified address.



19. During the investigation, the investigating officer put it to the Council that this (i.e. the copies of the statutory notices) was not the information sought by Mr Proctor and Ms Lees. In the investigating officer's view, the information they sought was the original survey carried out at the property which had informed and underpinned the repairs that were subsequently noted on the statutory notices. The investigating officer asked the Council whether this specific information was actually held.
20. In its response, the Council stated that the surveyor's report requested by Mr Proctor and Ms Lees did not exist and was not held.
21. The investigating officer subsequently asked the Council to explain the process by which relevant repairs were identified and subsequently transferred to a statutory notice. The Council was also asked to clarify whether any searches had been undertaken in order to establish whether it held any original survey undertaken at the property.
22. In response, the Council explained that the usual practice in these cases was for the officer carrying out the initial survey at a property to take some handwritten notes and then translate this into the appropriate wording for inclusion in the statutory notice once back in the office. The Council stated that the statutory notice was the official record maintained by its Property Conservation Department. The Council stated that officers tended to discard their notes once the statutory notice had been issued. The Council further explained that additional searches had been undertaken to establish whether the original notes had been retained, but that no relevant information still existed.
23. At this stage, the Council noted that, in terms of regulation 10(4)(a) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when the applicant's request is received.
24. Having considered the Council's submissions, its explanation of why the specific information sought by Mr Proctor and Ms Lees is not held, and its explanation of the steps taken in order to ascertain this, the Commissioner is satisfied that no information falling within the scope of the request was held by the Council at the time it received the request.
25. Having concluded that the Council did not hold any recorded information falling within the scope of the request, the Commissioner finds that the only appropriate response to the request would have been to notify Mr Proctor and Ms Lees that the requested information was excepted from disclosure under regulation 10(4)(a) of the EIRs, on the basis that it did not hold the information.



26. Having concluded that the Council did not hold any recorded information falling within the scope of this request, and that the Council failed to give any indication that the request was being refused on those grounds, the Commissioner finds that the Council failed to give proper notice in terms of regulation 13 of the EIRs (and in particular regulations 13(b) and (c)), which provides that, where a request to make environmental information available is refused by a Scottish public authority, the refusal must be provided in writing and must specify the authority's reasons for refusal. This should include details of any exception the authority considers applicable under regulation 10(4) or (5) (or provision of regulation 11), with the basis on which these are considered to apply, and also how the public authority has reached its decision with respect to the public interest under regulation 10(1)(b). (Since the Council did not hold any of the information that would fulfil the terms of the request, the Commissioner notes that there could not be any conceivable public interest in requiring that any information be made available.)
27. This decision makes the Council's position clear, so no purpose would be served by now requiring the Council to notify Mr Proctor and Ms Lees that the information is not held in order to rectify this breach.

DECISION

The Commissioner finds that the City of Edinburgh Council (the Council) does not hold recorded information that would meet the terms of the request made by Mr Proctor and Ms Lees, and that it did not hold such information at the time when it received the request. The Commissioner also finds that, by failing to give notice that it did not hold the requested information, the Council failed to comply with the requirements of regulations 13(b) and (c) of the EIRs. For the reasons set out above, the Commissioner does not require the Council to take any action in response to this failure.

Appeal

Should either Mr Proctor and Ms Lees 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
Head of Enforcement
18 December 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

-

(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;

...

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)-

...

(b) is subject to regulations 6 to 12.

...

10 Exceptions from duty to make environmental information available–

(1) A Scottish public authority may refuse a request to make environmental information available if-

(a) there is an exception to disclosure under paragraphs (4) or (5); and

(b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.



(2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-

- (a) interpret those paragraphs in a restrictive way; and
- (b) apply a presumption in favour of disclosure.

...

(4) A Scottish public authority may refuse to make environmental information available to the extent that

- (a) it does not hold that information when an applicant's request is received;

...

13 Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-

...

- (b) specify the reasons for the refusal including, as appropriate, any exception under regulation 10(4) or (5) or provision of regulation 11 and how the Scottish public authority has reached its decision with respect to the public interest under regulation 10(1)(b);
- (c) state the basis on which any exception relied on under regulation 10(4) or (5) or provision of regulation 11 applies if it would not otherwise be apparent

...