

Decision Notice



Decision 168/2013 Mr Maurice Hardy and Highland Council

Communications relating to planning application

Reference No: 201300073
Decision Date: 9 August 2013

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Scottish Information Commissioner

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Summary

On 17 April 2012, Mr Hardy asked Highland Council (the Council) for records of communications relating to a specific planning application. The Council directed Mr Hardy to its website for the information and provided further information following a review. Additional information was provided to Mr Hardy during the investigation and the Commissioner was satisfied that this represented all the information held by the Council and covered by Mr Hardy's request. The Commissioner found that the Council failed to provide (i) all the information it held when responding to Mr Hardy and (ii) adequate advice and assistance to Mr Hardy in relation to his request.

Given the Council's eventual disclosure of all the information, the Commissioner did not require it to take any action.

Relevant statutory provisions

Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 9(1) and (3) (Duty to provide advice and assistance)

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 17 April 2012, Mr Hardy wrote to the Council requesting the following information in respect of the planning application (ref. 12/00017/FUL) for the Adelphi Distillery, Acharacle:
... all email and written communication, and records of conversations where they exist, between any officers of the council and the applicants relevant to the current and previous planning applications/proposals/discussions for this site. This is to include any email/correspondence concerning a planning proposal for a distillery or other relevant scheme for adjacent land.
2. The Council responded on 19 April 2012 and provided Mr Hardy with a link to its website, indicating that this contained the information he was looking for.



3. Mr Hardy emailed the Council again on 22 May 2012, asking why it had not responded to his request. It transpired that Mr Hardy had given the Council an incorrect email address. The Council re-sent the response, to the correct address, on the same day.
4. Later that day, Mr Hardy wrote to the Council requesting a review of its decision. He expected more information to be held, particularly notes of conversations and meetings. He also asked about the apparent disappearance from the Council's website of a particular letter.
5. The Council notified Mr Hardy of the outcome of its review on 31 July 2012. The response included a CD of documents and some documents in hard copy. It had been preceded by a further CD of documents, followed by related correspondence between Mr Hardy and the Council. The Council believed it had now fulfilled the request.
6. On 8 January 2013, following further correspondence with the Council, Mr Hardy wrote to the Commissioner. He stated that he was dissatisfied with the outcome of the Council's review and applied 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 Mr Hardy made a request for information to a Scottish public authority and 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 explain the searches and other enquiries it had undertaken in order to identify, locate and retrieve any information falling within the scope of Mr Hardy's request.
9. The Council responded with submissions. Further information was located and provided to Mr Hardy during the investigation. The Council also provided further submissions to clarify certain outstanding points.
10. Mr Hardy provided the Commissioner with additional submissions during the investigation.



Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered the relevant submissions, or parts of submissions, made to her by both Mr Hardy and the Council. She is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

12. The Council confirmed to the Commissioner that it considered the information requested to be environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns a planning application for a reasonably substantial development in a rural location and the Commissioner is satisfied that it falls within paragraphs (a) and (c) of the definition in regulation 2(1) (see Appendix).

Mr Hardy's reasons for dissatisfaction

13. In his application to the Commissioner, Mr Hardy identified a number of areas of dissatisfaction. The investigating officer explained that the Commissioner could not consider the disappearance of the letter referred to in paragraph 4 above, as this did not (on any reasonable interpretation) fall within the scope of Mr Hardy's request for information. The investigating officer confirmed that the investigation could consider whether the Council held any further information falling within the scope of the request, and also its general handling of the request.

Has all relevant information been identified, located and provided by the Council?

14. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives a request, as opposed to information an applicant believes the authority should hold, but which is not in fact held.
15. The Council acknowledged that it carried out no searches as part of its initial response to Mr Hardy's request stage: it had understood all the information falling within the scope of the request should be available on its website, and provided him with the link which should have enabled him to view it. In its submissions to the Commissioner, the Council accepted that it should have carried out searches for the information at this stage, confirming that not all of the information in the planning file had been accessible through its website and acknowledging that (as pointed out by Mr Hardy) some of the emails there were only empty "shells". It explained that the latter problem had arisen from a technical error in uploading the documents.
16. The Council explained the searches carried out at review stage, the search terms used and the staff involved. While it considered that it had given Mr Hardy the results of these, the Council confirmed that it would provide a further full copy of the planning file, to include the content of the "shell" correspondence.



17. With regard to any oral exchanges and meeting discussions (another specific area of concern identified by Mr Hardy), the Council stated that these were not recorded systematically, but only where they were particularly relevant or material to a case (where a note would be inserted into the case file). Where present, it submitted, these should have been caught by its searches.
18. Further correspondence followed in relation to the “shell” emails. The Council managed to identify the majority of these and provided Mr Hardy with a list. Some were duplicated in information already provided to Mr Hardy, while some further information was provided to Mr Hardy during the investigation. By the close of the investigation, seven of the emails could not be found. Having consulted its external ICT service provider, the Council confirmed that these would have been routinely deleted from its systems, in accordance with the relevant retention policies (as indicated above, it would have been expected that they had been uploaded to the website and therefore were no longer required in individual email accounts). The service provider confirmed that the emails could not be recovered.
19. The Council submitted that it held no further information falling within the scope of Mr Hardy’s request, in addition to that provided already.
20. The Commissioner has considered the Council’s submissions and the information provided to Mr Hardy. On the balance of probabilities, she is satisfied that the Council has now identified, located and provided all of the information it holds and which falls within scope of Mr Hardy’s request.
21. However, in the circumstances narrated above, the Commissioner has concluded that the Council did not identify, locate and provide all of the relevant information until after her investigation commenced. Consequently, she must conclude that the Council failed to comply with regulation 5(1) of the EIRs in responding to Mr Hardy’s request.

The Council’s handling of the request

22. Clearly, given the circumstances narrated above, the Council exhibited a lack of care in dealing with Mr Hardy’s request. It was not reasonable to assume that all relevant information would be accessible on the relevant part of the Council’s website, and the Commissioner is pleased to note that the Council has reviewed its practice and guidance in this area (although she hopes this will not lead to a reduced amount of information being available electronically – that would not be in the spirit of the EIRs).
23. Even after its searches at review stage, however, it is apparent that the Council did not check the information provided to Mr Hardy thoroughly, as is shown by its provision of the “shell” emails. By the time the matter was further investigated following Mr Hardy’s application to the Commissioner, the full emails had already been deleted from the Council’s systems. It is difficult in all the circumstances (including the fact that Mr Hardy took five months after the review outcome to apply to the Commissioner) to characterise these deletions as inappropriate, but the fact remains that the information should have been checked more thoroughly when it was provided to Mr Hardy.



24. Given a more thorough check, and given the substantial amount of information provided, the Council might also have provided Mr Hardy with a schedule containing basic details of the documents, particularly the date of each document and a brief description. The list generated by the CD does not serve this purpose, containing only (for each document) a reference number and the date of uploading. While the actual date of each document can be found within the document itself, the Commissioner considers this to be a case where it would have been appropriate, in line with regulation 9(1) of the EIRs, for the Council to assist the applicant's ready understanding of the information by providing a schedule. In this connection, she notes that the Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs¹ states (in section 1.3 of part 2) that the obligation under regulation 9(1) continues at the point of providing information.
25. While she does not consider it reasonable to require the creation of a schedule in retrospect, the Commissioner would remind the Council to consider in future cases whether it would be appropriate in the circumstances to provide one.
26. The Commissioner notes that the Council has apologised for its handling of the case, both to herself and to Mr Hardy. She has identified no evidence of a deliberate attempt to frustrate the request, as Mr Hardy suggested.

DECISION

The Commissioner finds that Highland Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Hardy. The Council failed to comply with regulation 5(1) of the EIRs by not identifying, locating and providing information that fell within the scope of the request. The Council also failed to comply with regulation 9(1) of the EIRs by failing to provide Mr Hardy with adequate advice and assistance when responding to his request.

Given that the Council has now disclosed the relevant information, the Commissioner does not require it to take any action in respect of these breaches in response to Mr Hardy's application.

¹ <http://www.scotland.gov.uk/Resource/Doc/933/0109425.pdf>

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Appeal

Should either Mr Hardy or Highland 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.

Margaret Keyse
Head of Enforcement
9 August 2013



Appendix

Relevant statutory provisions

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.

...



9 Duty to provide advice and assistance

(1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...

(3) To the extent that a Scottish public authority conforms to a code of practice under regulation 18 in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with the duty imposed by paragraph (1) in relation to that case.

...