

Decision Notice

Decision 153/2015: Q and Aberdeen City Council

Building warrants

Reference No: 201500738

Decision Date: 2 October 2015



Scottish Information
Commissioner

Summary

On 25 September 2014, Q asked Aberdeen City Council (the Council) whether there had been any building warrants applied for or granted for a named property since 1994.

The Council informed Q that it would cost £70 to provide this information, the standard fee for its Property History search service.

The Commissioner investigated and found that the Council had failed to respond to Q's request for information in accordance with FOISA and the EIRs. The Council was not entitled to charge for a search service under its publication scheme, as it claimed. The Council also failed to issue a refusal notice which complied with regulation 13 of the EIRs. She required the Council to issue a revised response to Q's requirement for review.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 23(1) and (2) (Publication schemes); 73 (Interpretation) (definition of "information" and "publication scheme")

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulation 2(1) (Interpretation – definitions (a), (b) and (c) of "environmental information"); 8(1), (3) and (8) (Charging); 13(b) and (e) (Refusal to make information available)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 25 September 2014, Q made a request for information to the Council. It asked the Council for "formal written confirmation" that no building warrants had been applied for, or granted, for the named property since 1994; if this was incorrect, Q asked the Council to provide details of the building warrants.
2. The Council responded on 6 October 2014. It stated that it regarded Q's request as a request for a Property History, and that providing this service would cost £70.
3. On 19 October 2014, Q wrote to the Council requesting a review of its decision, in accordance with the EIRs. It stated that it had not asked for a Property History search, or for copies of any documents. Q commented that all it required was the titles/descriptions and dates of any building warrants for the named property since 1994. Q considered the charge of £70 to be unreasonable and unjustifiable. It noted that the Council had provided verbal information about building warrants during a telephone enquiry made a few weeks previously.
4. On 23 October 2014, the Council wrote to Q. It did not make reference to the EIRs or to FOISA, but simply explained that the only way it could provide formal written confirmation of the facts relating to building warrants for the named property would be in the form of a Property History Search. The Council explained that members of the public are entitled to

gain access to the Building Standards Register under their own efforts at no cost, and are allowed to make searches to view appropriate documentation.

5. On 20 April 2015, Q wrote to the Commissioner and applied 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. Q stated it was dissatisfied with the outcome of the Council's review because it considered the fee of £70 for the provision of the requested information to be unreasonable and unjustifiable.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Q made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision. The case was allocated to an investigating officer.
7. On 7 May 2015, the Council was notified in writing that Q had made a valid application. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions, including justifying charging £70 for providing the information.
8. The Council subsequently entered into correspondence with Q. It confirmed that only two building warrants were held for the property prior to 1994 and explained that the system used by its Applications Support Team is not intuitive enough to search for permutations of the spelling of the named property. It stated that a character-specific search would be required and that this is what the £70 charge was for. The Council advised that Q could undertake a manual search of the Building Standards Register at a named Council building, but warned that there were fourteen A4 ring binders per year, containing an average of 2000 separate applications.
9. Q advised the investigating officer that it required written confirmation of the information concerning the building warrants, and declined the Council's suggestion that it carry out its own search.
10. On 17 June 2015 the Council was asked to provide formal submissions in connection with Q's application. The Council responded on 6 July 2015.
11. On 7 July 2015, the Council was asked to provide additional submissions in connection with the searches required for a Property History search and a sample Property History report. The Council responded on 15 July 2015.

Commissioner's analysis and findings

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

The Council's submission

13. The Council indicated that it was entitled to charge £70 for its Property History search because the service and the associated charge were included in its publication scheme.

14. Section 23 of FOISA requires a Scottish public authority to adopt and maintain a publication scheme approved by the Scottish Information Commissioner and to publish information in accordance with that scheme. The scheme must specify the classes of information which a public authority publishes, the manner in which information in each class is published, and whether the information is available free or on payment.
15. Information which is covered by a publication scheme is available to anyone and should be easy to access quickly without having to make an information request for it.
16. The EIRs do not contain any requirement regarding publication schemes; however, section 73 of FOISA makes no distinction between environmental and non-environmental information in publication schemes, so the requirement to publish information in accordance with a publication scheme (section 23 of FOISA) applies equally to environmental and non-environmental information.
17. In its submissions, the Council explained that property information such as building warrants is covered by its publication scheme. It stated that it was not charging for providing the requested information to Q (if it held any relevant recorded information); instead, it was charging a fee for its Property Enquiry search.
18. The Council stated that it charges for establishing whether it holds information about building warrants for a property, rather than for the provision of such information. It considered that it was impossible to accurately identify whether a building warrant may exist for a property without doing a property history search.
19. The Council stated that the £70 charge for a property history search was published on its website, on its "property enquiry certificates page"¹, which could be located by using the website's A-Z list of services. The Council considered that the website A-Z serves as a guide to information covered by its publication scheme.
20. The Council also stated that the information provided on the property enquiry certificates page of the website met the requirement of regulation 8 of the EIRs to publish a schedule of fees and to provide information on when a fee may be charged.
21. The Council stated that there is a difference between providing information (e.g. a copy of a building warrant decision) and providing a service to identify whether there is any information that can be provided, and argued that it is justifiable to charge for this service.
22. The Council submitted that Q has been clear that it requires the results of the property history search rather than copies of building warrants. The Council considered that if Q had asked for copies of building warrants it would need Q to be able to specify enough information to permit retrieval of the relevant building warrants, and would charge £2 to £4.50 for a copy of each document. In circumstances where an applicant cannot provide enough information, the Council undertakes a Property History search (and charges for it) to do the work for the applicant and then produce a property history report.
23. The Council noted that Q specifically asked for "formal, written confirmation". The Council explained that it can only fully and formally confirm the existence of all building warrants for all address variations by carrying out a Property History search and providing a Property History Report.

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http://www.aberdeencity.gov.uk/planning_environment/planning/planning_sustainable_development/planning_home_page.asp

24. The Council noted that information sought in relation to building warrants is available to the applicant outwith a Property History search, as outlined previously. The Council submitted that it charges £70 for the service of locating and retrieving that information on behalf of an applicant, using expert knowledge of the area and its properties/sites.

The Commissioner's findings

25. The first question for the Commissioner is whether the £70 charge for the Council's Property History search service is permissible in terms of the Council's publication scheme.
26. All Scottish authorities have adopted the Commissioner's Model Publication Scheme (MPS). This requires them to publish a Guide to Information that they make available. The current MPS (2015) and guidance on the MPS are accessible on the Commissioner's website².
27. The MPS Guidance states that the published Guide to Information can take whatever form suits an authority best, including an A-Z format. Although the Commissioner accepts that a website A to Z guide can serve as a Guide to Information covered by the MPS, she does not, however, consider this means that everything within an A to Z guide will represent published information covered by the MPS.
28. The Commissioner has issued guidance for public authorities adopting the MPS. The current version of the guidance (2015) addresses the question of whether a Scottish public authority which provides a research/information service can include it in their Guide to Information. The guidance states, on page 13:
- "No, it is not an acceptable alternative to publishing the actual information you hold. The service itself is not offering something that is pre-prepared. For example, certified extracts from registers, family history searches and property enquiry certificates involve creating new information from other information which may already be published. The new information, or certificate, does not actually exist until someone asks you to create it. So is not already prepared and available to anyone to access easily and quickly without having to make a request for it."³*
29. The Council adopted the MPS in 2013. The Guidance available at that time contained similar advice⁴.
30. The Commissioner does not accept that the Council's Property History search represents information which is routinely published by the Council, and finds that the Council is wrong to consider that the Property History search falls within the scope of its publication scheme.
31. Given that the Commissioner does not accept that the Property History search service is covered by the Council's publication scheme, she does not accept that the publication scheme provides justification for the fee of £70 which the Council has asked Q to pay for

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<http://www.itspublicknowledge.info/ScottishPublicAuthorities/PublicationSchemes/PublicationSchemeResources.aspx>

3

<http://www.itspublicknowledge.info/ScottishPublicAuthorities/PublicationSchemes/TheModelPublicationScheme.aspx>

4

<http://www.itspublicknowledge.info/ScottishPublicAuthorities/PublicationSchemes/PublicationSchemeResources.aspx>

establishing whether it holds any building warrants for the property post-dating the warrant issued in 1994.

32. The Commissioner notes that the Council's submission makes passing reference to regulation 8 of the EIRs, which allows Scottish public authority to charge for environmental information (i.e. environmental information which is not covered by the MPS). Regulation 8(3) states that fees charged for making environmental information available shall not exceed a reasonable amount and in any event shall not exceed the costs to the authority of producing the information requested. Regulation 8(8) requires a Scottish public authority to publish and make available to applicants a schedule of its fees.
33. The Commissioner accepts that information about building warrants is likely to be environmental information, as defined in regulation 2 of the EIRs, and that a request for information about building warrants should therefore be considered in terms of the EIRs.

Content of notices

34. The Council's initial response and review response to Q did not cite which exception or provision in the EIRs (or, indeed, in FOISA) it was relying on to withhold the requested information. In addition, the Council's response and review response did not provide Q with details of its right to seek a review and apply for a decision from the Commissioner.
35. Accordingly, the Commissioner has concluded that the Council failed to comply with the requirements of regulation 13(b) and (e) of the EIRs in responding to Q's request.

Conclusion

36. The Commissioner takes the view that the Council should have dealt with the request from Q in accordance with the EIRs, given that the request was for environmental information. She requires the Council to issue a revised response to Q's request for review, in compliance with the EIRs. Any charge which the Council wishes to make for the information requested by Q must comply with the provisions of regulation 8 of the EIRs.

Decision

The Commissioner finds that Aberdeen City Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 and with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Q.

The Council wrongly imposed a charge of £70 on the grounds that this was permissible under its approved publication scheme. The Council's responses did not comply with regulations 13(b) and (e) of the EIRs.

The Commissioner therefore requires the Council to issue a revised response to Q's requirement for review in compliance with the EIRs, by **16 November 2015**.

Appeal

Should either Q or the Council 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.

Enforcement

If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner

2 October 2015

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.

23 Publication schemes.

- (1) A Scottish public authority must -

- (a) adopt and maintain a scheme (in this Act referred to as a “publication scheme”) which relates to the publication of information by the authority and is approved by the Commissioner;
- (b) publish information in accordance with that scheme; and
- (c) from time to time review that scheme.

- (2) A publication scheme must specify -

- (a) classes of information which the authority publishes or intends to publish;
- (b) the manner in which information of each class is, or is intended to be, published; and
- (c) whether the published information is, or is intended to be, available to the public free of charge or on payment.

...

73 Interpretation.

In this Act, unless the context requires a different interpretation –

...

“information” (subject to sections 50(9) and 64(2)) means information recorded in any form;

...

“publication scheme” has the meaning given by section 23(1)(a);

...

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;
- (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;

...

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.

...

(8) A Scottish public authority shall publish and make available to applicants-

- (a) a schedule of its fees; and
- (b) information on the circumstances in which a fee may be charged, waived or required to be paid in advance.

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);

...

- (e) inform the applicant of the review provisions under regulation 16 and of the enforcement and appeal provisions available in accordance with regulation 17.

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