

Decision Notice

Decision 015/2016: Mrs H and East Dunbartonshire Council

Planning information

Reference No: 201501209

Decision Date: 27 January 2016



Scottish Information
Commissioner

Summary

On 21 October 2014, Mrs H asked East Dunbartonshire Council (the Council) for information relating to a specific planning application.

In relation to the information under consideration here, the Council stated that all of the information was available on its website and as such was exempt in terms of section 25(1) of FOISA. The Commissioner carried out an investigation and found that the Council failed to identify the request as a request for environmental information, which it should have responded to under the EIRs.

The Commissioner was satisfied that, by the end of the investigation, all relevant information held had been provided to Mrs H.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 16 (Review by Scottish public authority)

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. Mrs H was in correspondence with the Council regarding a specific planning application. Whilst some of this earlier correspondence contained written requests for recorded information, the Council did not deal with them as requests for information (but as correspondence regarding a complaint). Given that the Council did not deal with those requests under either FOISA or the EIRs, Mrs H was unaware of her rights under FOISA and the EIRs and did not ask the Council to review any of the responses. As she did not request reviews, the Commissioner cannot consider this earlier correspondence.
2. On 21 October 2014, Mrs H made a request for information to the Council. She referred to the ongoing correspondence and made a number of information requests. These included a request for all correspondence relating to the planning application and its approval. She specifically stated that this should be treated as a Freedom of Information request.
3. The Council responded on 31 October 2014. In relation to her request for all correspondence relating to the planning application, the Council informed her that this was available online. Therefore, the Council stated that it was relying upon section 25(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). (Under section 25(1), information is exempt from disclosure if the applicant can reasonably obtain the information other than by requesting it under FOISA.) It further explained that if she could not access the information on-line, she may be able to use library facilities or call at the Council office to inspect the information held.
4. On 6 November 2014, Mrs H wrote to the Council requiring a review of its decision. She submitted that not all of the information she sought was available on-line, and so disagreed with the application of section 25(1) of FOISA.

5. Following further correspondence, the Council notified Mrs H of the outcome of its review on 10 March 2015. The Council stated that it understood Mrs H had been provided with a paper copy of the planning file during a meeting in December 2015. The Council confirmed that it did not hold any other information, in addition to what had already been provided.
6. On 21 June 2015, Mrs H wrote to the Commissioner. She 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 specified modifications. Mrs H stated she was dissatisfied with the outcome of the Council's review and sought the Commissioner's assistance to help resolve perceived inconsistencies and ensure all information was provided.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mrs H made 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.
8. On 21 July 2015, the Council was notified in writing that Mrs H had made a valid application. The case was allocated to an investigating officer.
9. 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 regarding the way it had handled Mrs H's request for information.
10. The Council responded, providing submissions to the effect that it accepted that the request fell to be dealt with in terms of the EIRs. It also provided submissions in support of its position that (including information provided during the investigation) it had provided Mrs H with all relevant information it held.
11. Mrs H acknowledged receipt of the information disclosed during the investigation. Mrs H also made a number of submissions regarding the way the Council had managed the planning application, but these are not matters that can be considered by the Commissioner.

Commissioner's analysis and findings

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

FOISA or EIRs?

13. It is clear from the Council's correspondence with both Mrs H and the Commissioner that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns planning permission for a development of some substance, and the Commissioner is satisfied that it would fall within either paragraph (a) of the definition of environmental information contained in regulation 2(1) of the EIRs (as information on the state of the elements of the environment) or paragraph (c) of that definition (as information on measures affecting or likely to affect those elements).

14. Mrs H has not suggested that the request should have been handled other than under the EIRs, and the Commissioner will consider her application in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs

15. 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. This obligation relates to information held by an authority when it receives a request.
16. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) of the EIRs requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies.
17. In this case, it is apparent Mrs H made a number of requests for recorded information. It is also apparent that the information that was requested was “environmental information”, as mentioned above, and as such fell to be considered under the EIRs.
18. Having made a valid request for information on 21 October 2014, the Council initially responded on 31 October 2015, explaining to Mrs H that it considered section 25(1) of FOISA to apply. It is apparent that in responding in terms of section 25(1) of FOISA, the Council failed to identify the request as a request for environmental information. There was nothing to suggest that it had changed this position in the review outcome of 10 March 2015. In failing to identify the request as being for environmental information, and respond accordingly under the EIRs, the Council failed to comply with regulation 5(1) of the EIRs.

Regulation 16 of the EIRs

19. Regulation 16 of the EIRs states that, on receipt of a requirement for review, the authority shall review the matter and decide whether it has complied with the EIRs, within 20 working days (regulations 16(3) and (4)). It also states that where an authority has not complied with its duty under the EIRs, it shall immediately take steps to remedy the breach of duty (regulation 16(5)).
20. Mrs H wrote to the Council on 6 November 2014, specifically asking the Council to review its decision on the basis that not all of the information she had requested was available online. Despite reminders that she was awaiting a response to her requirement for review in subsequent correspondence, the Commissioner can identify nothing which would qualify as a review outcome under regulation 16, until its email of 10 March 2015 (well after the expiry of the relevant timescale). Even this did not identify the failure to respond under the EIRs, or take the necessary remedial steps, as required by regulation 16(5).
21. Taking all of the circumstances into account, it is apparent that the Council failed to respond to Mrs H’s requirement for review in accordance with regulation 16 of the EIRs. Given the findings of this decision, and the response which was sent on 10 March 2015, she does not require the Council to take any remedial action now.

Handling of request – information held

22. During the investigation by the Commissioner, the Council accepted that the request should have been dealt with in terms of the EIRs. It also confirmed that during the investigation it had written to Mrs H and apologised about the way in which her information request had been handled: it gave the Commissioner a copy of this letter.

23. The Council accepted that in dealing with Mrs H, it did not clearly separate the request for information from the other communications in relation to the planning issue Mrs H had an interest in. It acknowledged that the request should have been dealt with independently of the planning process and other procedures. In particular, the Council accepted that Mrs H's requirement for review had not been given the status it should have been.
24. The Council stated that it had since taken steps to raise awareness of the responsibilities under both FOISA and the EIRs within the authority. It explained that training had been provided to key employees, supported by a suite of guidance notes.
25. The Council also explained that any information falling within the scope of the request would be held within the planning file for the case in question. It confirmed that during the investigation the entire planning file was replicated and a copy provided to Mrs H. It confirmed that no further information falling within the scope of the request was identified.
26. Having considered the relevant submissions and the terms of the request, the Commissioner is satisfied that by the end of the investigation, the Council had provided Mrs H with all of the information that it held and which fell within the scope of the request. However, this should have been done (at the latest) on conclusion of the Council's review: in failing to achieve this, the Council failed to comply with regulation 5(1) of the EIRs.
27. The Commissioner also has more general concerns about the way in which the Council handled Mrs H's correspondence. While, as indicated above, this decision cannot make specific findings under the EIRS in relation to the correspondence prior to 21 October 2015, the Commissioner is concerned that this earlier correspondence was not identified as containing information requests and responded to accordingly. These concerns were brought to the Council's attention separately and dealt with under the Commissioner's Interventions Policy.

Decision

The Commissioner finds that East Dunbartonshire Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mrs H.

The Commissioner finds that by failing to identify the request as a request for environmental information, and respond accordingly, and in failing to identify, locate and provide all the information it held and which fell within the scope of Mrs H's request, the Council failed to comply with regulations 5(1) and 16 of the EIRs.

Given that all relevant information held by the Council was provided to Mrs H during the investigation, the Commissioner does not require the Council to take any action.

Appeal

Should either Mrs H 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.

Margaret Keyse
Head of Enforcement
27 January 2016

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;

...

(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.

...

16 Review by Scottish public authority

(1) Subject to paragraph (2), an applicant may make representations to a Scottish public authority if it appears to the applicant that the authority has not complied with any requirement of these Regulations in relation to the applicant's request.

(2) Representations under paragraph (1) shall be made in writing to the Scottish public authority no later than 40 working days after either the date that the applicant receives any decision or notification which the applicant believes does not comply with these Regulations or the date by which such a decision or notification should have been made, or any other action should have been taken, by the authority but was not made or taken.

- (3) The Scottish public authority shall on receipt of such representations-
 - (a) consider them and any supporting evidence produced by the applicant; and
 - (b) review the matter and decide whether it has complied with these Regulations.
- (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.
- (5) Where the Scottish public authority decides that it has not complied with its duty under these Regulations, it shall immediately take steps to remedy the breach of duty.

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