

Decision Notice

Decision 089/2016: Mr Thomas McFadden and East Dunbartonshire Council

Asbestos reports

Reference No: 201502154

Decision Date: 26 April 2016



Scottish Information
Commissioner

Summary

On 22 January 2015, Mr McFadden asked East Dunbartonshire Council (the Council) for information relating to asbestos at his home address, and also asbestos test sample results for all vacant properties over the preceding year.

The Council provided some information, while stating that other information was excepted from disclosure under the EIRs as internal communications. Following investigation, the Commissioner found that the Council had partially failed to respond to Mr McFadden's request for information in accordance the EIRs, by withholding some of the information requested by Mr McFadden.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b) and (f) of definition of "environmental information"); 5(1) and (2) (Duty to make available environmental information on request); 10(1), (2) and (4)(e) (Exceptions from duty to make environmental information available); 13(a) and (b) (Refusal to make information available); 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. On 22 January 2015, Mr McFadden made a request for information to the Council. Referring to asbestos-related issues at his home address, he asked for:
 - a) a copy of all correspondence between the Council and the Health and Safety Executive (HSE) regarding those issues.

Mr McFadden went on to refer to a newspaper article, which referred to asbestos sampling being carried out when textured coatings were found by the Council in void (vacant) properties. In this regard, he asked the Council for:

 - b) a copy of all test sample results taken from these void properties over the past year.
2. The Council responded on 10 April 2015. It apologised for the delay in responding and provided Mr McFadden with information in response to part a) above. It explained that some information had been redacted, as personal data or where it was considered commercially sensitive.
3. In relation to part b) of the request, the Council informed Mr McFadden that it considered the organisations who provided the reports to be the Council's agents and that it was withholding the information under regulation 10(4)(e) of the EIRs (internal communications). It explained that it would be happy to provide details of asbestos in public buildings and (in relation to those properties) to those residing in properties containing asbestos, but did not believe it appropriate to disclose the information requested to Mr McFadden in response to his request. The Council explained that, without being able to put the existence of asbestos into proper context, so a tenant could properly understand the situation, disclosure would be likely to cause undue alarm to the tenants concerned.

4. On 13 April 2015, Mr McFadden wrote to the Council, requiring a review of its decision. He did not believe that he had been provided with all of the information falling within the scope of part a) of his request. He repeated his request for the test samples and suggested that the Council could provide the samples with the addresses removed (as it had done to information provided in response to part a)).
5. The Council notified Mr McFadden of the outcome of its review on 14 August 2015. Again, it apologised for the delay in responding. It confirmed that it had provided, subject to redaction, all of the correspondence it held and which fell within the scope of part a) of the request. It maintained that the information held and covered by part b) was excepted from disclosure in terms of regulation 10(4)(e) of the EIRs.
6. The Council also informed Mr McFadden that it had treated his request for the sampling information with the addresses removed, as outlined in his email of 13 April 2015, as a new request for information. It took the view that this information would still be excepted from disclosure in terms of regulation 10(4)(e).
7. On 17 August 2015, Mr McFadden sought a further review, as he had been advised he could do.
8. On 9 September 2015, the Council responded to Mr Fadden's review request. The Council maintained that he had been provided with the information falling with part a) of his request and upheld the application of regulation 10(4)(e) of the EIRs regarding part b), even if addresses were redacted.
9. On 16 November 2015, Mr McFadden wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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. Mr McFadden stated he was dissatisfied with the outcome of the Council's review. He questioned whether all information pertaining to part a) of his request had been provided and argued that it was in the public interest to know the information covered by part b).

Investigation

10. The application was accepted as valid. The Commissioner confirmed that Mr McFadden 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.
11. On 15 December 2015, the Council was notified in writing that Mr McFadden had made a valid application. The Council was asked to send the Commissioner the information withheld from him. The Council provided a sample of the information withheld and the case was allocated to an investigating officer.
12. 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. It was asked to justify its decision to withhold information, with reference to the requirements of any provisions of FOISA and the EIRs it considered applicable to the information requested, and also to explain the steps taken to establish what relevant information it held.

13. The Council responded, providing submissions to the effect that the request fell to be dealt with in terms of the EIRs and, as a result, applying the exemption in section 39(2) of FOISA (see below). It also provided submissions to support of its position that it had identified and located all of the information it held falling within the scope of part a) of Mr McFadden's request.
14. The Council also confirmed that the information requested at part b) of the request had been withheld in terms of regulations 10(4)(e) of the EIRs, in that (in the Council's view) it represented internal communications and disclosure was likely to cause alarm. The relevant submissions received from the Council will be considered fully in the Commissioner's analysis and findings below

Commissioner's analysis and findings

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

FOISA or EIRs?

16. The relationship between FOISA and the EIRs is set out in some detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹ and need not be repeated in full here. However, it is relevant to reiterate some of the key points which are relevant in this decision:
 - The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition of environmental information in the EIRs.
 - 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.
 - Any request for environmental information therefore **must** be dealt with under the EIRs.
 - In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2), thereby removing the need to consider that request further in terms of FOISA.
17. The Council submitted that its procedures for assessing the existence of asbestos within Council owned buildings fell within the definition of environmental information, as defined in regulation 2(1) of the EIRs. In reaching this view, it had taken into account the potential effect on human health of the presence of asbestos in the air.
18. Given the subject matter of the requests (which relates to the presence of asbestos within premises and measures taken by the Council in response), the Commissioner is satisfied that any information falling within the scope of these requests would be environmental information, as defined in regulation 2(1) of the EIRs. She considers the information would fall within paragraph (b) (relating to factors affecting or likely to affect the elements of the environment) and/or paragraph (f) (relating to matters including the state of human health and safety, insofar as they may be affected by matters including the factors referred to in

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2007/200600654.aspx>

paragraph (b)) of the definition of environmental information contained in regulation 2(1) of the EIRs. The Council responded to Mr McFadden in terms of the EIRs and Mr McFadden has not disputed this. The Commissioner will consider the information in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs

19. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
20. In relation to part a), the Council explained that the information was all held in the working files and emails of a specific Council officer, tasked with co-ordinating its efforts to monitor asbestos across the whole of the Council area. That officer, therefore, held copies of all information held by the Council relating to asbestos. The officer was familiar with Mr McFadden's property and his concerns in relation to it, and could locate the information readily. It confirmed that, other than the information provided to Mr McFadden, it held no further information.
21. Having considered all relevant submissions and the terms of part a) of the request, the Commissioner accepts that the Council interpreted the request reasonably and took adequate, proportionate steps to establish what information it held and which fell within the scope of the request. On the balance of probabilities, she is satisfied that the Council held no further information falling within the scope of this part of the request. Consequently, in respect of part a) (insofar as Mr McFadden has applied to the Commissioner in respect of this part – he has not challenged the Council's application of exceptions to this information), the Commissioner is satisfied that the Council responded to the request in accordance with regulation 5(1) of the EIRs.
22. The Commissioner will now consider part b) of the request.
23. The Commissioner notes that in seeking a review on 13 April 2015, Mr McFadden stated that (in relation to part b) of the request) the Council could provide the samples with the addresses removed (as it had done to information provided in response to part a)). Mr McFadden sought a review on that basis. (More on the Council's handling of the request is considered below.)
24. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available. In its response to Mr McFadden's requirement for review, and during the investigation, the Council maintained that the information falling within part b) of Mr McFadden's request was excepted from disclosure in terms of regulation 10(4)(e) of the EIRs, even if the addresses were to be removed.

Regulation 10(4)(e) of the EIRs (internal communications)

25. Under regulation 10(4)(e) of the EIRs, a public authority may refuse to make environmental information available to the extent that it involves making available internal communications. In order for information to fall within the scope of this exception, it need only be established that the information is an internal communication. As with all exceptions under the EIRs, however, regulation 10(4)(e) is subject to the public interest test.

26. The Council confirmed that it held asbestos surveys meeting the requirements of Mr McFadden's request. It submitted that these surveys comprised internal communications for the purposes of regulation 10(4)(e) of the EIRs.
27. The Council acknowledged that the company which produced the asbestos reports and provided them to the Council was not part of its internal structure. However, it submitted that the relationship between the Council and the company in question was one which makes the exchange of communications between them internal.
28. The Council explained that it did not have the specialist resources to carry out this kind of work in-house. Instead, the external contractor carried this work out, in accordance with the Council's instructions. The Council submitted that the contractor made no decisions in respect of the surveys, but provided guidance and recommendations to the Council on how to deal with this material. The Council further commented that it considered any relevant information held by the contractor to be held on behalf of the Council. In all the circumstances, it concluded that the information should be deemed to be internal communications.
29. In interpreting the EIRs, the Commissioner's must take account of the Aarhus Convention Implementation Guide² (the Guide). In relation to the application of regulation 10(4)(e) of the EIRs, the Commissioner notes that (at page 85) the Guide specifically states that "studies commissioned by public authorities from related, but independent, entities" cannot be considered to be internal communications. It further states that: "Moreover, once particular information has been disclosed by the public authority to a third party, it cannot be claimed to be an 'internal communication'."
30. The Commissioner considers it is not the intention of the Aarhus Convention, or the EIRs, that this exception should extend to every communication between a public authority and its external contractors/consultants. There may be limited categories of communications with third parties which do qualify under this exception – such as privileged communications with an external legal advisor – but they will be limited.
31. In this particular case, there would appear to be nothing to distinguish the arrangement described with the external contractor from a whole range of other contracts for services with external providers. The Commissioner does not believe that communications under contracts such as these can routinely be subject to the exception in regulation 10(4)(e). There is nothing in particular, in this case, which would persuade her that this arrangement should be any different.
32. Having considered all of the submissions from Council on this point, therefore, the Commissioner is not satisfied that there is any basis for describing the sampling information sought by Mr McFadden as internal communications for the purposes of regulation 10(4)(e) of the EIRs.
33. As the Commissioner finds that the exception in regulation 10(4)(e) of the EIRs did not apply to the information withheld, she is not required to go on to consider the public interest under regulation 10(1)(b) of the EIRs.
34. That said, even if the Commissioner accepted that the information could be construed as internal communications for the purposes of regulation 10(4)(e), she notes that the Council's

²http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

consideration of the public interest test appears to have been based entirely on an apprehension that disclosure of information relating to asbestos was likely to cause alarm. These submissions appear to be speculative, with no obvious basis in evidence or assessed risk. They appear to involve no consideration of what measures might be taken to mitigate the apprehended alarm. They appear to fall far short of what the Commissioner would expect in substantiating a risk of harm to the public interest. The Council may wish to bear this in mind in responding to future requests.

35. The Commissioner requires the Council to provide Mr McFadden with the information requested, with addresses removed in accordance with the review request of 13 April 2015.

Handling of the request

36. Whilst the Commissioner notes that Mr McFadden did not raise any dissatisfaction in his application with the procedural aspects of Council's handling of his request, there are significant issues she believes it appropriate to consider further.
37. Regulation 5(2)(a) of the EIRs gives Scottish public authorities a maximum of 20 working days after receipt of the request to comply with a request for information, subject to certain provisions which are not relevant in this case.
38. Regulation 13 of the EIRs provides that, 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:
- be given in writing within 20 working days after the date of receipt of the request (regulation 13(a));
 - specify the reasons for the refusal including, as appropriate, any exception under regulation 10(4) or (5), and how the public authority reached its decision with respect to the public interest under regulation 10(1)(b) (regulation 13(b)).
39. Given that the Council did not respond to Mr McFadden's request of 22 January 2015 within the 20 working days, or issue a refusal notice meeting the requirements of regulation 13 within that time, it is apparent that the Council failed to comply with the requirements of regulations 5(2)(a) and 13 of the EIRs.
40. Mr McFadden's email of 13 April 2015 clearly expresses dissatisfaction with the response he has received to his request. It makes representations to the Council submitting that Mr McFadden is not satisfied that he has received a compliant response. It is clearly a requirement for review for the purposes of regulation 16 of the EIRs.
41. In its submissions to the Commissioner, the Council stated that it did not interpret Mr McFadden's email of 13 April 2015 as a requirement for review, but rather as part of an ongoing dialogue with a view to resolving his concerns. It is not clear why that resolution could not have been achieved through a review: in any event, the Council was required to carry one out.
42. It is apparent that the Council treated Mr McFadden's confirmation (in his requirement for review) that the information he sought could be provided without addresses, as a new request for information. It is not clear why it should have done so – it was the same request, only limited by the removal of one element – and the Council did not explain this in its submissions to the Commissioner.

43. The Council acknowledged that a review was not carried out, and the outcome communicated to Mr McFadden, until 9 September 2015. This is not acceptable: the Council's response to the 13 April email should have been treated as the outcome of the review he asked, with no part of that email being treated as a new request.
44. Regulation 16 of the EIRs states that, on receipt of a requirement to conduct a review, the authority shall review the matter and decide whether it has complied with the regulations, 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)).
45. Having received Mr McFadden's email of 13 April 2015, the Council did not issue him with a response until 14 August 2015. The Commissioner would consider it reasonable to interpret that communication as a review outcome, although it appeared to leave the question of removing addresses unresolved (or at least open to a further review). She must still find that it failed to meet the requirement to respond within 20 working days.
46. In responding to the investigating officer, the Council accepted that its handling of the request did not meet the requirements of the EIRs, and in particular that the time taken to respond to the request and requirement for review was clearly unacceptable. Whilst submitting that complexity of the request and staffing limitations were mitigating factors, the Council acknowledged that these were not reasonable justifications for the time taken. The Commissioner notes the apologies proffered to Mr McFadden in correspondence.
47. The Commissioner further notes that the individual, who provided the initial response of 10 April 2015, was the same individual who responded to the requirement for review on 14 August 2015. Whilst this, in itself, is not a breach of FOISA or the EIRs, and notwithstanding the Council's arguments that this was not a review response, the Commissioner must observe that this cannot be considered good practice.
48. The Commissioner also draws attention to the Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs (the Section 60 Code)³, which specifically advises, at paragraph 10.3.3 in Part 2:
- The aim of a review is to allow the authority to take a fresh look at its response to an information request, to confirm the decision (with or without modifications) or, if appropriate, to substitute a different decision. The review procedure must therefore be fair and impartial and allow decision makers to look at the request afresh. It should also enable different decisions to be taken. Review procedures should be sufficiently flexible to allow for differing circumstances such as the complexity and sensitivity of the information.*
49. It also recommends at 10.3.4:
- It is good practice for the reviewer to be a person who did not respond to or advise on the original request (where possible or practicable).*
50. The Commissioner considers it should be both possible and practicable for an organisation the size of the Council to ensure that all reviews are considered by someone other than the officer who responded to the initial request.

³ <http://www.gov.scot/Resource/0046/00465757.pdf>

51. Overall, the Commissioner has significant concerns about the Council's handling of this request. The result of the Council's approach in this case is that it took almost nine months from the date of the initial request to a final outcome following what the Council perceived to be a review. Clearly, this was unacceptable.
52. The Commissioner does not require the Council to take any action regarding its failures in terms of regulations 5, 13 and 16 of the EIRs, as outlined above. However, the Council should be aware that if similar breaches, or practice which fails to meet the Section 60 Code, occur in future, the Commissioner will consider taking further action against the Council in line with her intervention strategy.

Decision

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

The Commissioner finds that the East Dunbartonshire Council complied with the EIRs in responding to part a) of Mr McFadden's request, in the respects identified in Mr McFadden's application.

In relation to part b) of the request, the Commissioner finds that the Council was not entitled to withhold the information on the basis that it was excepted from disclosure under regulation 10(4)(e) of the EIRs. By failing to make the information available, the Council failed to comply with regulation 5(1) of the EIRs.

The Commissioner also finds that the Council failed to respond to Mr McFadden's requirement for review in accordance with regulation 16 of the EIRs. In the circumstances, she does not require the Council to take any action in respect of this breach, in response to Mr McFadden's application.

The Commissioner therefore requires the Council to provide Mr McFadden with the information requested, subject to the redaction of addresses, by **10 June 2016**.

Appeal

Should either Mr McFadden 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.

Margaret Keyse
Head of Enforcement

26 April 2016

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);

...

(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

(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
 - ...
 - (e) the request involves making available internal communications.

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-

- (a) be given in writing as soon as possible and in any event no later than 20 working days after the date of receipt of the request for the information;
- (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);

...

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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