

Decision Notice

Decision 120/2016: Residents Against Turbines Scotland and the Scottish Ministers

Whether request was complied with as soon as possible

Reference No: 201600555

Decision Date: 27 May 2016



Scottish Information
Commissioner

Summary

On 22 January 2016, Residents Against Turbines Scotland (RATS) asked the Scottish Ministers (the Ministers) for information relating to a specified planning appeal.

The Ministers responded and provided some information. Following a review, RATS remained dissatisfied and applied to the Commissioner for a decision as to whether the Ministers had responded to the request “as soon as possible”.

The Commissioner investigated and found that the Ministers had properly responded to RATS’ request for information in accordance with the EIRs. She accepted that the Ministers had responded to the request as promptly as they could have under the circumstances, and in any case within the 20 working day period laid down in regulation 5(2)(a) of the EIRs.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) and (2)(a) (Duty to make available environmental information on request)

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 2016, RATS made a request for information to the Ministers in relation to a specified planning appeal. The information request stated:
 - (i) What is the cost to public finances for this appeal? As an example, what was the cost to hire the Hotel in Stranraer, the Reporter and his staff, administrative costs, and all other costs to the taxpayer? [...]
 - (ii) Total annual costs to the tax payer for the Reporters Unit and the DPEA (Planning and Environmental Appeals Division). If this information is already in the public domain, the provision of a link is required. [...]
 - (iii) Provide me with a reliable date when this appeal will be concluded and published by Scottish Ministers.
2. The Ministers responded on 19 February 2016, applying section 39(2) of the Freedom of Information (Scotland) Act 2002 (FOISA) and proceeding to handle the request under the EIRs. They provided information in response to the request and included an email address for a staff member at their Energy Consents Unit, advising RATS to contact this person for a timescale which would address part (iii) of their request.
3. On 24 February 2016, RATS wrote to the Ministers, requiring a review of their decision. RATS expected a direct response to part (iii) of their request and submitted that the Ministers had not responded to the request “as soon as possible”, as required by regulation 5(2)(a) of the EIRs.

4. The Ministers notified RATS of the outcome of their review on 14 March 2016. They acknowledged that they should have provided a direct response to part (iii) and apologised for failing to do so. The Ministers provided an approximate timescale for issuing the appeal decision, but confirmed that they did not have a definite date and therefore notified RATS that they did not hold the requested information.
5. The Ministers explained that pressure of work had prevented them from being able to respond to RATS' request until the relevant deadline of 20 working days (as laid down in regulation 5(2)(a) of the EIRs). The Ministers denied that their response had been "held back" or not given appropriate priority.
6. On 27 March 2016, RATS wrote to the Commissioner. RATS 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. RATS stated they were dissatisfied with the outcome of the Ministers' review because they did not accept that pressure of work had any relevance to the requirement to respond as soon as possible. They believed the request could have been responded to sooner.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that RATS made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.
8. On 8 April 2016, the Ministers were notified in writing that RATS had made a valid application and 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 Ministers were invited to comment on this application, with reference to the areas of dissatisfaction expressed by RATS.
10. The Ministers provided their submissions on 28 April 2016.

Commissioner's analysis and findings

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

Application of the EIRs

12. It is evident from the subject matter (information about a planning appeal relating to a proposed development with environmental implications) that any information falling within the scope of RATS' request would be environmental information, as defined in regulation 2(1) of the EIRs (paragraphs (a) and (c) of the definition are set out the Appendix). RATS have not disputed the Ministers' handling of the request under the EIRs: in fact, the sole issue raised in their application relates to the interpretation of a phrase in the EIRs. The Commissioner will therefore consider the Ministers' handling of the request solely in terms of the EIRs.

Submissions from RATS

13. RATS disagreed with the arguments presented by the Ministers in their review response regarding pressure of work having a bearing on request response times.
14. RATS contended that the Ministers' failure to provide the requested information until the twentieth working day was unacceptable. They quoted regulation 5(2)(a) of the EIRs which states that a request 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. RATS did not accept that responding to the request should have taken as long as it did, arguing that it was not complex and would not have required detailed searches to locate the information.
15. RATS submitted that there was no exception in the EIRs that allowed pressure of work to be taken into account in determining whether a request was responded to "as soon as possible". They considered the Ministers' actions in this respect to be contrary to the spirit of the legislation.

Submissions from the Ministers

16. The Ministers submitted that they had responded to RATS' request within the 20 working days stipulated in regulation 5(2)(a) of the EIRs, and so did not consider they had breached any part of the EIRs. They also considered they had responded to the request as soon as possible, within the constraints of their day to day work.
17. The Ministers explained that their DPEA had just over 200 live cases at the end of February 2016, the vast majority of which required action by the administration team during the period they were dealing with RATS' request. The Ministers explained that in the period from 22 January to 19 February the DPEA: received a further 43 cases, issued decisions in a further 56 cases and received 60 letters addressed directly to Scottish Ministers (to which it was required to either respond on their behalf or prepare a draft response for Ministers).
18. The Ministers stated that at this time they were also working to ensure that the report to Ministers on the appeal (due to be submitted during the period in which they were dealing with RATS' request) was submitted on time. This included preparing all the background and briefing for Ministers. According to the Ministers, RATS had previously expressed concerns regarding the delay in submitting this report. They therefore considered it would be helpful if they could confirm submission of the report when responding to RATS.
19. The Ministers did not accept that they had deliberately withheld providing the response until the twentieth working day. They asserted that the DPEA's work was ongoing and was subject to many different deadlines and requirements. All work had to be prioritised and responded to as soon as it was possible, taking into consideration other work pressures. As RATS were provided with the information requested within 20 working days, the Ministers reiterated their belief that they had complied with the EIRs.

The Commissioner's findings

20. In reaching a finding in this case, the Commissioner has taken into account the Upper Tribunal's findings in *John v Information Commissioner and Ofsted (Information rights: Freedom of information - right of access)* [2014] UKUT 444 (AAC) (06 October 2014)¹

¹ <http://www.bailii.org/uk/cases/UKUT/AAC/2014/444.html>

21. The Commissioner is not bound by the Upper Tribunal's findings, but is of the view that its interpretation of the equivalent Freedom of Information Act (2002) (FOIA)² phrasing can be taken as a reasonable guide in this case.
22. Section 10(1) of FOIA (in line with section 10(1) of FOISA) requires that, subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
23. Paragraph 37 of the Tribunal's decision states, with reference to section 10(1) of FOIA:

Dictionaries show that 'promptly' has a range of meanings. Some relate to attitude, such as willingly or unhesitatingly. Others relate to time, ranging from immediate to without delay. It would be wrong to substitute an expression for the language of the statute. It is, though, necessary to interpret that language. The context of section 10(1) is concerned with time rather than attitude, although the latter can have an impact on the former. It is too demanding to expect a public authority to respond immediately. That would be unattainable. In the context, promptly is more akin to 'without delay'.

There are three factors that control the time that a public authority needs to respond.

First, there are the resources available to deal with requests. This requires a balance between FOIA applications and the core business of the authority.

Second, it may take time to discover whether the authority holds the information requested and, if it does, to extract it and present it in the appropriate form.

Third, it may take time to be sure that the information gathered is complete. Time spent doing so, is not time wasted.

FOIA is important legislation that imposes obligations on public authorities; they are entitled to take time not only to find the information requested but to ensure as best they can that there is nothing more to be found. It is then necessary to complete the administrative and bureaucratic tasks of presenting the information and obtaining approval for release.
24. In this case the Commissioner is looking at whether or not the Ministers responded to RATS' request "as soon as possible", the phrase in regulation 5(2)(a) of the EIRs. She considers it appropriate to apply the same general considerations as the Upper Tribunal in deciding whether this requirement was met by the Ministers. However, she would note that responding to information requests is statutory and so in her view a core function of an authority. In this context she has, in relation to the first factor, considered the balance between responding to FOISA and EIRs requests, and *other* core functions of an authority.
25. The word "promptly" is used in section 10(1) of both FOISA and FOIA (the provision of FOIA, on which the Upper Tribunal's decision is based). Regulation 5(2)(a) of the EIRs serves the same fundamental purpose, that is of securing access to information within a reasonable time and certainly within a statutory maximum time. Although FOISA and EIRs use different language, the Commissioner considers it reasonable to take a consistent approach to how both "promptly" and "as soon as possible" are applied. In this case she has adopted the approach taken by the Upper Tribunal.

² <http://www.legislation.gov.uk/ukpga/2000/36/contents>

26. The Upper Tribunal referred to three factors. The Commissioner considers that the first of these is particularly relevant to this decision. The Ministers' submissions hinge on the resources they had available to respond to RATS' request. The DPEA has a range of statutory functions to carry out, including complying with requests under the EIRs.
27. The Commissioner acknowledges that authorities have many demands on their time, and have to prioritise resources to meet a range of deadlines and statutory requirements. While she expects authorities to respond to information requests promptly, she accepts that it is reasonable to do so in the context of other duties.
28. In this case, the Ministers explained that the everyday casework of the DPEA is subject to its own demanding timescales and that it needed to balance compliance with EIRs timescales (and FOISA) with meeting its other demands, all within available (finite) resources. The Commissioner accepts this.
29. The other two factors taken into account by the Upper Tribunal concern different aspects of searching for, locating and retrieving all the information held. The Commissioner accepts that what is reasonable for one information request in terms of time taken, may not be reasonable for another as it can depend on a range of factors such as the complexity of the information, its sensitivity, how and where it is held, how easy it is to retrieve and so on. As with other considerations in FOISA and the EIRs this should be considered on a case-by-case basis. There will be information it is wholly reasonable to expect will be located readily and therefore provided more quickly than information less readily available, taking other priorities into consideration.
30. In this case, the Commissioner notes RATS' assertion that the information requested was not complex and should not have required detailed searches to locate. RATS has not explained why it believes this to be the case, but neither (unfortunately) have the Ministers responded to this point. In the absence of comments from either party on this point there is nothing in this case that would lead the Commissioner to conclude that the response time was unreasonable as a result of searching for and providing information of the kind RATS were seeking.
31. In the circumstances, the Commissioner is satisfied that RATS' request was responded to as soon as possible within the context and circumstances of the case. There is no basis for concluding otherwise. The Ministers balanced the resources they had available to ensure they responded to the request without unnecessary delay (and within statutory timescales), against a range of other tasks and deadlines.
32. The Commissioner therefore finds that the Ministers responded to RATS' request for information in accordance with the EIRs. She is satisfied that the Ministers responded to the request as soon as possible, as required by regulation 5(2)(a) of the EIRs.

Decision

The Commissioner finds that the Scottish Ministers complied with the Environmental Information (Scotland) Regulations 2004, in particular with regulation 5(2)(a), in responding to the information request made by Residents Against Turbines Scotland.

Appeal

Should either Residents Against Turbines Scotland or the Scottish Ministers 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.

Rosemary Agnew
Scottish Information Commissioner

27 May 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) –

(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

...

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