

Decision Notice

Decision 029/2017: City of Brechin and District Community Council and Angus Council

Value of specified Common Good assets

Reference No: 201601892

Decision Date: 8 March 2017



Scottish Information
Commissioner

Summary

The Council was asked for information on the value of specified Common Good assets. The Council refused the request, arguing that the information was excepted from disclosure under the EIRs.

During the investigation, it became apparent that the Council had not interpreted the terms of the request as the Community Council intended. However, the Commissioner was satisfied that the Council had complied with the EIRs when responding to the request.

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) (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 6 July 2016, the City of Brechin and District Community Council (the Community Council) made a request for information to Angus Council (the Council). The request stated that it concerned the “Common Good Funds – Statement of Brechin Common Goods Fixed Assets – 31 March 2016”, supplied in response to a previous information request on 13 May 2016. The request was for:
 - (i) *The value of the “Ground, Careston”*
 - (ii) *The value of the “Ground, Cattle Raik, Brechin”*
 - (iii) *The value of the “Ground, Cattle Raik, Lochty”*
 - (iv) *The value of the “Ground, Cattle Raik, Friendly Park”*
 - (v) *The value of the “Ground, Cattle Raik, Trinity”*
 - (vi) *The value of the “Shed, Cattle Raik”*
 - (vii) *The value of the “Ground, Willie Mills Burns”.*
2. The Council did not respond to this request and, on 18 August 2016, the Community Council wrote to the Council asking it to review its failure to respond.
3. The Council did not respond to the requirement for review within the timescale set down in section 21(1) of FOISA and regulation 16(4) of the EIRs.
4. On 3 October 2016, the Community Council applied to the Commissioner for a decision on the Council’s failure to respond to its requirement for review.
5. The Council subsequently carried out a review and notified the Community Council of the outcome on 4 October 2016. The Commissioner then issued *Decision 227/2016 City of*

*Brechin and District Community Council and Angus Council*¹ on 25 October 2016, finding breaches of the technical requirements of FOISA and the EIRs in the Council's handling of the request.

6. In its review outcome, the Council informed the Community Council that the information requested was excepted from disclosure in terms of regulation 10(5)(e) of the EIRs. This was on the basis that its disclosure would, or would be likely to, substantially prejudice the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
7. On 16 October 2016, the Community Council wrote to the Commissioner. The Community Council 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. The Community Council stated it was dissatisfied with the outcome of the Council's review as it disagreed that the information requested was excepted from disclosure. The Community Council stated also that the information was in its possession, as a third party had obtained it from the Council and had forwarded it to the Community Council.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that the Community Council 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.
9. On 16 November 2016, the Council was notified in writing that the Community Council had made a valid application. The Council was asked to send the Commissioner the information withheld from the Community Council. The Council provided information, indicating that this was the information it considered fell within the scope of the Community Council's request.
10. At this stage, the investigating officer contacted the Council and pointed out that the information the Council believed that the Community Council was seeking appeared to differ from that referred to by the Community Council in its application to the Commissioner. The investigating officer suggested to the Council that it write to the Community Council explaining how it had interpreted and handled the request.
11. On 17 January 2017, the Council wrote to the Community Council. The Council explained that it had interpreted the request as requiring the market valuations of specific parcels of land occupied along the length of the Cattle Raik, once that land had been alienated from the Brechin Common Good.
12. The Council also informed the Community Council that the information which had previously been disclosed to the third party who had forwarded it on to the Community Council was a listing of capital values for Common Good land recorded in the Common Good accounts. The information disclosed in response to the third party's request did not comprise market valuations.
13. The Council explained to the Community Council that the listing of capital values could have been disclosed to it in response to its request, although it did not (in the Council's view) appear to fulfil the request. The Council explained that the information which it had withheld

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201601804.aspx>

from the Community Council (i.e. the information which it had interpreted as being the subject of the Community Council's request) was distinctly different to the information provided earlier to the third party.

14. The Council provided additional contextual information to the Community Council, explaining that it had decided in May 2016 that the valuation for individual land transactions along the Cattle Raik should be based on market value. The Council informed the Community Council that it was those valuations which had been excepted from disclosure in its review response of 4 October 2016 (being what it understood the Community Council to be seeking).
15. The investigating officer subsequently wrote to the Community Council, pointing out that the Council had attempted to explain the apparent inconsistency in its responses to the Community Council and the third party. The investigating officer asked the Community Council if it still required a decision from the Commissioner, given the explanation provided by the Council and bearing in mind that it already had the information supplied to the third party.
16. In response, the Community Council declined to withdraw its application for a decision. The Community Council indicated that it was unhappy with the Council's explanation of how it had interpreted the request. The Community Council also confirmed that the information it had requested on 6 July 2016 was identical to the information it had in its possession and which had been supplied to the Commissioner along with its application for a decision on 16 October 2016 (i.e. the information supplied previously to the third party).
17. 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, focusing on its interpretation of the request.
18. The Council responded on 7 February 2017.

Commissioner's analysis and findings

19. 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 the Community Council and the Council. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

20. The Commissioner is satisfied that the information captured by this request is environmental information, as defined in regulation 2(1) of the EIRs. The information relates to the valuation of land assets (which the Council had interpreted as being the market valuations) and policy options relating to these assets. The Commissioner considers paragraphs (a) and (c) of the definition of environmental information (reproduced in Appendix 1) to be applicable. This would be the case whichever valuation was at issue.
21. The Community Council has not queried the handling of the request under the EIRs and the Commissioner will consider that handling in what follows solely in terms of the EIRs.
22. Regulation 5(1) of the EIRs requires a Scottish public authority that holds environmental information to make it available when requested to do so by any applicant. This is subject to various qualifications contained in regulations 6 to 12.
23. Under the EIRs, a Scottish public authority may refuse to make environmental information available if (in its view) one or more of the exceptions in regulation 10 apply and, in all the

circumstances of the case, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).

24. In this case, the Council's interpretation of the request led it to believe that the information requested was excepted from disclosure in terms of regulation 10(5)(e) of the EIRs. Given the variance in interpretation of the request, this is not a matter the Community Council has asked the Commissioner to consider.

The Council's interpretation of the request

25. It is apparent that the Council reached a different interpretation of the request from that intended by the Community Council. This may have been clarified had it not been for the Council's failure to respond to both the initial request and the Community Council's subsequent requirement for review.
26. As noted above, the Council wrote to the Community Council on 17 January 2017, explaining how it had interpreted the request. The Council pointed out also that it would have been content to disclose the information that the Community Council apparently wanted to receive – information which had been disclosed previously to a third party.
27. In the Commissioner's view, the Council's interpretation of the request was reasonable in the circumstances. Whilst the Community Council has subsequently clarified that it was seeking different information, the Commissioner is unable to find anything irrational in the Council's approach: there was no obvious ambiguity in the request, which appears on the face of it to be capable of bearing the interpretation arrived at by the Council. The Commissioner does not consider that the Council's misinterpretation of the request was made with deliberate intent.
28. The Commissioner considers also that the Council's communication of 17 January 2017 to the Community Council was rational and attempted quite reasonably to explain why it had interpreted the request in the way that it did. The Commissioner notes in addition that the Council made it clear that it would have had no issues with disclosing the information the Community Council was actually seeking.
29. Accordingly, the Commissioner is satisfied that, notwithstanding the apparent misunderstanding over the interpretation of the request, the Council complied with regulation 5(1) of the EIRs in responding to the Community Council's request for information.

Decision

The Commissioner finds that, in respect of the matters specified in the application, Angus Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the City of Brechin and District Community Council.

Appeal

Should either the City of Brechin and District Community Council or Angus 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

8 March 2017

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.

...

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