

Decision Notice

Decision 083/2019: Mr Antony Jack and City of Edinburgh Council

St James Quarter

Reference No: 201801607

Decision Date: 22 May 2019



Scottish Information
Commissioner

Summary

The Council was asked about the development of the St James Quarter.

The Council initially handled Mr Jack's requests under another access regime, but then informed him that his request was manifestly unreasonable.

After an investigation, the Commissioner accepted that the Council was entitled to refuse to comply with these requests on the basis that they were manifestly unreasonable but identified some failings in terms of the handling of the requests.

The Commissioner required the Council to provide Mr Jack with advice and assistance to narrow the scope of his requests.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 5(1) and (2) (Duty to make available environmental information on request); 9 (Duty to provide advice and assistance); 10(1), (2) and (4)(b) (Exceptions from duty to make environmental information available); 13(a) (Refusal to make information available); 16(3) (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 Appendices form part of this decision.

Background

1. On 4 July 2018, Mr Jack made requests for information to City of Edinburgh Council (the Council). Mr Jack requested financial and contractual information related to the development of the St James Quarter. Full details of his requests (4.1 – 4.7) can be found in Appendix 2.
2. The Council responded, on 13 July 2018, under section 101 of the Local Government (Scotland) Act 1973¹. (This allows an interested party to inspect a local authority's accounts.) Mr Jack was provided with responses to parts 4.1 and 4.4. of his request and was told that the other aspects of his information request (those which did not relate to access rights under section 101) were passed to the Council's information governance section for consideration under FOI.
3. On 19 July 2018, the Council provided Mr Jack with responses to the remaining parts of his request, again under section 101.
4. On 2 August 2018, Mr Jack wrote to the Council requesting a review of its decision, on the basis that he had received no response to the aspects of his request the Council stated would be responded to under FOI.
5. The Council notified Mr Jack of the outcome of its review on 24 August 2018. The Council confirmed that it handled the FOI aspects of his requests under the EIRs and apologised for

¹ <https://www.legislation.gov.uk/ukpga/1973/65/section/101>

the delay, explaining that it was only able to respond to his requests once the section 101 process had been completed. With reference to aspects of his requests handled under FOI, the Council considered the requests to be manifestly unreasonable in terms of regulation 10(4)(b) of the EIRs. The Council stated that time and expense involved in complying with the requests would be regarded as excessive by any reasonable person.

6. On 25 September 2018, Mr Jack 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 Jack stated he was dissatisfied with the outcome of the Council's review because he disagreed with the Council's characterisation of his requests and was not satisfied with their handling or the time taken to respond.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr Jack made requests for information to a Scottish public authority and asked the authority to review its responses to those requests before applying to him for a decision.
8. On 11 October 2018, the Council was notified in writing that Mr Jack had made a valid application.
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 to answer specific questions. These related to:
 - (i) the Council's reliance on regulation 10(4)(b)
 - (ii) the Council's handling of the requests
 - (iii) the time taken to respond to the requests.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both Mr Jack and the Council. He is satisfied that no matter of relevance has been overlooked.

Regulation 10(4)(b) – manifestly unreasonable

11. The Council relied on regulation 10(4)(b) to refuse to comply with aspects of Mr Jack's requests. The Council explained that it understood that Mr Jack wished to utilise the section 101 process to access the information requested. The Council recognised that some of the information would not be accessible through the section 101 process and consequently referred his request to the FOI unit.
12. The Council confirmed that it processed the requests consecutively, dealing in the first instance with those aspects of his requests that could be processed under section 101. With regards to the aspects of Mr Jack's requests that did not fall within the section 101 process, the Council relied on regulation 10(4)(b). Further comment on how the Council handled this request is set out below.

13. Under the exception in regulation 10(4)(b) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request for information is manifestly unreasonable. In considering whether the exception applies, the authority must interpret it in a restrictive way and apply a presumption in favour of disclosure. Even if it finds that the request is manifestly unreasonable, it is still required to make the information available unless, in all the circumstances, the public interest in doing so is outweighed by that in maintaining the exception.
14. The following factors are relevant when considering whether a request is manifestly unreasonable, that is, that the request:
 - (i) would impose a significant burden on the public authority;
 - (ii) does not have a serious purpose or value;
 - (iii) is designed to cause disruption or annoyance to the public authority;
 - (iv) has the effect of harassing the public authority;
 - (v) would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.
15. This is not an exhaustive list. Depending on the circumstance, other factors may be relevant, provided the impact on the authority can be supported by evidence. The Commissioner recognises that each case must be considered on its merits, taking all the circumstances into account.

The Council's submissions

16. The Council argued that the provision of the information would be manifestly unreasonable because it would impose a significant burden on the Council. It calculated the staff time and costs that would be incurred for producing the requested information and stated that its decision was primarily based upon the impact processing the request would have on its ability to complete its statutory functions.
17. The Council explained that a Council officer would have been required to locate, retrieve and collate the information. They would be required to apply the necessary redactions to ensure that commercially sensitive information and individuals' personal data were not incorrectly released into the public domain. The Council estimated that it would take an officer five minutes to convert and mark up each of the necessary documents. The Council identified at least 2,400 emails (other forms of correspondence/information were requested) within the scope of Mr Jack's request, equating to 200 hours of officer time. In the circumstances, the Council did not consider it reasonable or in the public interest to process this request.

Mr Jack's submissions

18. Mr Jack submitted in his application that the Council did not question the formulation of his requests or seek an extension of time (regulation 7) to respond and, due to the order in which his requests were handled by the Council (consecutively, firstly under the section 101 process and only then under the EIRs), he was denied the opportunity to seek a review from the Council.

Commissioner's conclusion

19. There is no definition of “manifestly unreasonable” in the EIRs, or in the Directive 2003/4/EC² from which the EIRs are derived. The Commissioner’s view is that “manifestly” implies that a request should be obviously or clearly unreasonable.
20. Whether a request is manifestly unreasonable will depend on the facts of each case. It may apply where it can be demonstrated that a request is vexatious, or where compliance would incur unreasonable costs for the public authority or an unreasonable diversion of public resources.
21. The Council submitted that compliance with Mr Jack’s requests would impose a significant burden on its resources: it would involve at least 200 hours of staff time, which would have a detrimental impact on its ability to continue to carry out its statutory functions.
22. The Commissioner has taken account of the exact wording of Mr Jack’s request which was wide-ranging (see Appendix 2). The Commissioner recognises that requests which are too wide-ranging might lead to a response taking longer or mean unnecessary work of the authority and, by extension, they may lead to the request being refused on cost grounds. Mr Jack’s requests were related and included, and were not restricted to, all: correspondence, receipts, expenditure, deeds, payments, oversight data, meeting minutes, agendas, documents, reports etc. for the period of a year for a significant development in the city. The Commissioner accepts that these were wide-ranging requests.
23. Although the Council’s calculations are based on the identification and provision of emails alone, the Commissioner is satisfied that it was appropriate for the Council to rely on regulation 10(4)(b) in responding to these requests. He is satisfied that responding to these requests, given their wide-ranging nature, would impose a significant burden on the Council, which would, in the circumstances, have been manifestly unreasonable. Having reached this conclusion, the Commissioner is required to consider the public interest test in regulation 10(1)(b) of the EIRs.

Public interest test

24. In common with all the other exceptions in the EIRs, regulation 10(4)(b) is subject to the public interest test set out in regulation 10(1)(b). Consequently, information can be withheld under the exception only where, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception,
25. The St James Quarter development is major and ongoing, the Council submitted, and it recognised the particular interest in understanding and scrutinising the process. It recognised the public interest in promoting transparency and accountability through the disclosure of information relating to the development, where it was possible to do so. The Council highlighted that it had released reports and disclosed information in response to information requests, where possible. In terms of meeting the general public interest in understanding whether the Council achieved best value and acted in the citizens interests, the Council explained that there were already a number of mechanisms in place to obtain scrutiny in the public interest, including:
 - (i) reports to committee and Council; and

² <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0004:EN:HTML>

- (ii) councillors monitoring the Council's finances and agreements with other organisations, and being able to question officers and services on their constituents' behalf.
26. Against the arguments in favour of disclosure, the Council argued, must be balanced the impact on Council resources in handling the request. The Council argued that processing this request (excluding the information captured by the section 101 request) would divert an Information Rights Officer for at least five weeks. In this case, the Council concluded that it was not in the public interest to disrupt its ability to process other requests by diverting resources in this way.
27. In the Commissioner's view, there is an inherent public interest in disclosure of information which would ensure transparency about the nature and extent of the information a public authority holds, and which would permit adequate public scrutiny of its actions, particularly (as is the case here) where it concerns a significant project.
28. On the other hand, there is also a strong public interest in a Scottish public authority being able to carry out its statutory functions without unreasonable disruption. The Commissioner has considered the terms of this request in detail: it concerns a significant development within the city for which there will be a large volume of correspondence held by the Council, wide-ranging in scope including topic and time period. The Commissioner recognises that there is a public interest in protecting the integrity of the EIRs, but it is not the intention of the legislation to require public authorities to devote excessive or disproportionate amounts of resource to a particular request.
29. On balance, the Commissioner accepts, in all the circumstances of this case, that the public interest in making the information available is outweighed by the public interest in preventing the disproportionate levels of disruption to the Council that would result from providing information in response to this request.
30. The Commissioner concludes that the Council was entitled to withhold the information requested under the exception in regulation 10(4)(b) of the EIRs. However, Mr Jack also raised dissatisfaction with procedural aspects of the Council's handling of his request. In this regard, the Commissioner is satisfied that there are issues he should consider further, as set out below.

Handling of request

Timescales

31. 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 qualifications which are not relevant in this case.
32. Regulation 13 of the EIRs provides, subject to regulations 10(8) and 11(6), that 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)).
33. The Council explained that its failure to respond to Mr Jack within the statutory deadline was due to his request being processed under section 101 in the first instance. As Mr Jack's request referred to this legislation, it was this route the Council understood Mr Jack wished to utilise.
34. The Council stated that, once it was recognised that some of the information requested would not be covered by the section 101 rights, the request was also referred to the

Council's FOI staff. The Council acknowledged that the requests were processed consecutively, under the different regimes, and not concurrently. While the FOI request was logged and processed according to the normal procedures, the service believed the section 101 response required to be attended to first before the full scope of the information to be captured by the FOI request could be appreciated.

35. The Council submitted that it endeavours always to meet its statutory timelines, but there are occasions where it is unable to do so: this was one, given the considerations the service believed were necessary in this case.
36. The Council recognised that it could have acted more proactively and should have engaged with Mr Jack to identify what information was accessible under each regime. The Council also submitted that it should have recognised that this request was complex and, in line with what is permissible under the EIRs, extended the timescale to enable a response to be issued on time.
37. The Council only provided a partial response to Mr Jack's request of 4 July 2018 on 13 and 19 July 2018, and only to the extent that it consider the section 101 process to be applicable. To the extent that the EIRs applied, the Council did not take the opportunity to extend the timeframe for responding. The Council responded to Mr Jack's request in terms of the EIRs on 24 August 2018.
38. It is therefore a matter of fact that the Council failed to comply with the requirements of regulations 5(2)(a) and 13(a) of the EIRs in handling Mr Jack's request. This failure led to a missed opportunity to provide advice and assistance, to Mr Jack to allow him to frame his requests more appropriately.

Regulation 9 – advice and assistance

39. Regulation 9(1) of the EIRs provides that a Scottish public authority must, so far as it would be reasonable to expect it to do so, provide advice and assistance to applicants and potential applicants. Regulation 9(3) provides that a Scottish public authority which conforms with the relevant Code of Practice (in relation to the provision of advice or assistance) is to be taken to have complied with this duty.
40. The "relevant Code of Practice" is the Scottish Ministers' Code of Practice on the discharge of functions by the Scottish public authorities under FOISA and the EIRs³. This states (at paragraph 5.1 in Part 2):

Authorities have a duty to provide advice and assistance at all stages of a request. It can be given either before a request is made, or to clarify what information an applicant wants after a request has been made, whilst the authority is handling the request, or after it has responded.
41. The Council also acknowledged that it should have detailed the manner in which Mr Jack could have refined his request, so the Council could have been in a position to process it. The Council explained that, due to the circumstances of this case, it was not provided with an opportunity to correct these failings at review stage.
42. The Commissioner acknowledges that Mr Jack's request of 4 July 2018 presented as one made under the section 101 process. However, the request also met the requirements of regulation 5(1) of the EIRs; by guiding Mr Jack down the section 101 route alone and

³ <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

handling his requests consecutively was clearly a failure in terms of regulation 9(1) of the EIRs.

43. In his application to the Commissioner, Mr Jack highlighted a similar request for information on the Council's disclosure log submitted prior to his request, which disclosed some of the information that fell within the scope of his request. He highlighted that the Council had disclosed what it could in relation to that request.
44. The Council acknowledged that it should have directed Mr Jack to information that was already available to him on its disclosure log. The Council explained that this request was processed because the quantity of information that was within scope of that request was considerably smaller and, as a consequence, it was possible to apply the redactions without engaging the resources in the same way.
45. In failing direct Mr Jack to information that was already available to him and in failing to provide Mr Jack with adequate assistance to allow him to narrow the scope of his request, the Commissioner finds that the Council failed to comply with regulation 9(1) of the EIRs.

Action required

46. The Commissioner requires the Council to provide advice and assistance to Mr Jack in terms of regulation 9(1) of the EIRs, with a view to narrowing the scope of Mr Jack's requests and allowing him to make fresh requests as appropriate.

Decision

The Commissioner finds that Mr Jack's requests were manifestly unreasonable and that the exception under regulation 10(4)(b) of the Environmental Information (Scotland) Regulations 2004 (the EIRs) is therefore engaged.

However, the Commissioner also finds that the City of Edinburgh Council (the Council) failed to comply with the EIRs in failing to provide Mr Jack with adequate advice and assistance in terms of regulation 9(1) and failing to comply with timescales in terms of regulations 5(2)(a) and 13(a) of FOISA.

The Commissioner therefore requires the Council to provide advice and assistance to Mr Jack in terms of regulation 9(1), with a view to allowing him to narrow the scope of his requests, by 8 July 2019.

Appeal

Should either Mr Jack 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 City of Edinburgh Council (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

22 May 2019

The Environmental Information (Scotland) Regulations 2004

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
- ...

9 Duty to provide advice and assistance

- (1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.
- (2) Where a request has been formulated in too general a manner, the authority shall-
 - (a) ask the applicant as soon as possible, and in any event no later than 20 working days after the date of receipt of request, to provide more particulars in relation to the request; and
 - (b) assist the applicant in providing those particulars.
- (3) To the extent that a Scottish public authority conforms to a code of practice under regulation 18 in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with the duty imposed by paragraph (1) in relation to that case.

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 -

- (b) the request for information is manifestly unreasonable;

...

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;

...

16 Review by Scottish public authority

...

- (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.

...

Appendix 2: Mr Jack's request of 4 July 2018

"...I wish to inspect:

- 4.1 The Agreement made under Section 75 of the Town and Country Planning (Scotland) Act 1997 between the City of Edinburgh Council and the Developer of the St James Centre, Edinburgh and St James House, Edinburgh, made on or about 29 May and 2 June 2009, as it is presently extant. And all correspondence, receipts and expenditure made in relation to this agreement in the accounting period from 1 April 2017 to 31 March 2018.
- 4.2 The Agreement between City of Edinburgh Council and the Developer of the St James Centre, Edinburgh and St James House, Edinburgh that is referred to at Paragraph 2.9 ... of the Statement of Reasons for the St James Quarter (Number Two) Compulsory Purchase Order 2014...

And all correspondence, deeds, receipts, payments and expenditure in relation to this agreement in the accounting year from 1 April 2017 to 31 March 2018.
- 4.3 The Growth Acceleration Model [GAM] Agreement that was signed on 21 June 2016 [ref: Item 8.3 of Council Meeting 1 February 2018, paragraph 1.1.1.]. And all correspondence, receipts, payments and expenditure in relation to this agreement in the accounting year from 1 April 2017 to 31 March 2018. And all oversight data such as the monthly ESJ GAM Progress Meetings' agendas, documents/reports and minutes; the GAM Executive Meetings' agendas, documents/reports and minutes [such as GAM Progress Report No 2 & No 3; the Reports by the Project Monitor [named individual], Service Manager, Economic Development].
- 4.4 The contract referred to at paragraph (c) ... in the email [attached] sent at 17:31 hours 13 December 2017 by [named individual] under a duty of care for the City of Edinburgh Council...

And any correspondence between the CEC and the Developer concerning the contract, and any vouchers, invoices or receipts.
- 4.5 The funding agreement between CEC and the Scottish Government [ref Item 8.3 of Council Meeting 1 February 2018, paragraph 1.1.2.]. And all correspondence, receipts, payments and expenditure in relation to this agreement in the accounting year from 1 April 2017 to 31 March 2018. And all oversight data such as mentioned at Paragraph 4.3 above.
- 4.6 Any agreement between the City of Edinburgh Council and the Developer of the St James Centre, Edinburgh and St James House, Edinburgh about the involvement of the development team with pupils attending CEC Schools , i.e. Drummond Community High School.
- 4.7 The draft lease, as extant on 31 March 2018, of land that includes land in the title area to 23-26 St James Square, Edinburgh that CEC in their letter from [named individual] dated 13 June 2018 [attached] asserted their ownership of at the third paragraph [extracted provided]."

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