

Decision Notice 060/2022

Maintenance, inspection and upkeep of stairwell lighting

Applicant: The Applicant

Public authority: East Lothian Council

Case Ref: 202100892



Scottish Information
Commissioner

Summary

The Council was asked about the maintenance and upkeep of stairwell lighting, and its inspection, repair, complaints, etc., at a particular address in Musselburgh. The Council responded under the EIRs and issued a Fees Notice. The Applicant did not agree the information was environmental information. The Commissioner agreed that the information requested was environmental, and so fell within the EIRs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “the applicant” and “the Commissioner” and paragraphs (a), (b), (c) and (f) of definition of “environmental information) (Interpretation); 5(1) (Duty to make environmental information available on request); 8(1) and (3) (Charging); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

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 25 March 2021, a request was made on behalf of the Applicant to East Lothian Council (the Council) for:
 - (a) Confirmation of who is responsible for the maintenance and upkeep of the stairwell lighting at (specified address) in East Lothian.
 - (b) All inspection records held regarding the stairwell at the specified address from a period of 12/02/2020 to date (of request).
 - (c) Details of any repairs undertaken to the stairwell and/or its lighting at the address from a period of 12/02/2020 to date (of request).
 - (d) Details of any complaints received regarding the stairwell and/or its lighting at the specified address from a period of 12/02/2020 to date (of request).
 - (e) Details of any investigations carried out following any complaint received regarding the stairwell and/or its lighting at the specified address, including details of any visits to the locus from a period of 12/02/2020 to date (of request).
 - (f) Details of any accidents taking place within the stairwell at the specified address from a period of 12/02/2020 to date (of request).
 - (g) All documentation held regarding an accident occurring on 12/02/2021 at the specified address, including the reporting of and responding to this accident
 - (h) Details of any investigations carried out following the reporting of an accident occurring on 12/02/2021 at the specified address.
 - (i) Details of any risk assessment prepared in relation to the stairwell at the specified address.

- (j) Any CCTV footage held of the stairwell at the address on 12/02/2021.
2. The Council responded on 8 April 2021, informing the Applicant that, in terms of regulation 8 of the EIRs, payment of a fee was reasonable in order to comply with the request. The Council explained that it was its policy to recover full staff costs for every information request received which fell within the EIRs. The Council issued a fees notice to the Applicant, and referred to the [schedule of fees](#) on the Council's website¹.
 3. On 12 April 2021, the Applicant wrote to the Council requesting a review of its decision. She did not agree that her request was for environmental information, as defined by the EIRs, and believed her request should have been dealt with by the Council under FOISA.
 4. On 13 April 2021, the Council responded to the Applicant. The Council explained that, as her request focused on the maintenance, inspection and upkeep of the stairwell lighting at the specified address, it would fall within paragraphs (a) and (c) of the definition of environmental information in regulation 2(1) of the EIRs. The Council also sought clarification of part (g) of her request, apologising for not doing so in its correspondence of 8 April 2021. The Council explained that this part of the request had not been included in the fee calculation as it would comprise personal data, and as such would be excepted under regulation 11 of the EIRs (Personal data) and would be dealt with as a subject access request. (The Applicant's request of 25 March 2021 also included a subject access request.)
 5. On 5 May 2021, the Applicant wrote to the Council, outlining why she disagreed with the Council's view that the information was environmental, and asking for her request to be dealt with under FOISA.
 6. On 3 June 2021 the Council responded, upholding its initial view that the information was environmental and therefore fell under the EIRs, but also referring to paragraph (f) of the definition in regulation 2(1) of the EIRs that referred to "built structures".
 7. On 23 July 2021, the Applicant wrote to the Commissioner, applying 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 Applicant stated she was dissatisfied with the outcome of the Council's review because she did not consider that her request fell within the EIRs and should instead have fallen to be complied with under FOISA.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
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 why the Council considered the information requested fell within the definition of environmental information, as described in the EIRs.
10. The Council responded, explaining why it believed the request was for environmental information. The Council also reconsidered its Fees Notice. As a result of gathering the

¹ https://www.eastlothian.gov.uk/downloads/file/31135/schedule_of_fees

relevant information for the Commissioner's investigation, the Council found that the actual cost of collating the information requested was lower than it had stated in the original fees notice. The Council therefore issued a revised Fees Notice to the Applicant on 22 February 2022.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered all of the information falling within the scope of the request and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

FOISA or the EIRs

12. "Environmental information" is defined in regulation 2(1) of the EIRs (paragraphs (a), (b), (c) and (f) of the definition are reproduced in full in the Appendix to this decision). Where information falls within the scope of this definition, a person has a right to access the information under the EIRs, subject to qualifications and exceptions in the EIRs.
13. In respect of the stairwell and lighting of the specified address, the request sought: the identity of the person responsible for the maintenance and upkeep; inspection records; details of any repairs; details of any complaints received; details of any investigations carried out following any complaint received; details of any accidents and any investigations carried out following the reporting of an accident; details of any risk assessment; and any CCTV footage. The Council handled the Applicant's request under the EIRs and submitted that the information it held falling within the scope of the request was environmental. In its submissions, the Council explained that it only held information in relation to parts (a) to (e) of the Applicant's request.
14. Parts (a) to (e) of the request ask, in relation to the stairwell and its lighting, about responsibility for maintenance and upkeep, inspection records, repairs, complaints and investigations following complaints.
15. The Council considered the stairwell at the address met the definition of an element of the environment under regulation 2(1)(a) of the EIRs, which includes "land, landscapes and natural sites". The Council referred to the Commissioner's [Guidance – What is environmental information?](#)² where the definition of land includes "buildings and structures...and any rights or interest over land".
16. The Council submitted that the lighting of the stairwell met the definition of a factor of the environment under regulation 2(1)(b) of the EIRs, highlighting that it includes "energy...and other releases into the environment, affecting or likely to affect the elements of the environment referred to in [regulation 2(1)] (a)." The Council had also considered the Commissioner's guidance (as above) that states that "energy can be expressed in traditional scientific language; [including]...electrical...light...etc".
17. The Council's view was that the maintenance and upkeep of the stairwell met the definition of measures in definition (c) of environmental information in the sense of "the steps taken to secure an effect", i.e. to ensure the stairwell lighting remained in good condition. The Council also considered that these measures had implications for the state of human health

² <https://www.itspubliknowledge.info/foi-law>

and safety, to the extent that they are affected by the state of the light (factor), and therefore visibility, and the security of the built structure (element), thus meeting the definition of environmental information under regulation 2(1)(f) of the EIRs.

18. The Council submitted that inspections of the premises fell under the definition of “measures and activities” in regulation 2(1)(c) as it consisted of steps taken which were likely to affect the stairwell, lighting and state of human health and safety and was therefore considered environmental under the terms of regulation 2(1)(a), (b), (c) and (f) of the EIRs.
19. The Council believed repairs undertaken to the stairwell and/or its lighting fell within the definition of “measures and activities” in regulation 2(1)(c) as they directly affected the condition of the stairwell (element), lighting (factor) and have implications for the state of human health and safety and was therefore considered environmental under the terms of regulation 2(1)(a), (b), (c), and (f) of the EIRs.
20. The Council submitted that the substance of any complaints held falling within the scope of the request concerned environmental factors and elements (2(1)(a) and (b)), measures (2(1)(c) and likely effects on the state of human health and safety (2(1)(f)). The information was therefore environmental.
21. The Council considered investigations carried out following complaints about the stairwell and/or its lighting concerned environmental factors and elements and therefore met the definition of environmental information under regulation 2(1)(a) and (b), and the definition of measures under regulation 2(1)(c) and the state of human health and safety under regulation 2(1)(f) due to the visibility in the stairwell.
22. The Applicant did not agree that the information requested was environmental information, as defined in regulation 2(1) of the EIRs, but instead considered the request should have been dealt with under FOISA. The Applicant’s letter to the Council of 5 May 2021 explained why she believed the requested information was not environmental and she said that nowhere in the interpretation of “environmental information” did it state that physical buildings fell within this definition. If buildings and the stairwells inside them were intended to fall under this definition, it would be expressly included in the EIRs. The Applicant therefore believed that the request fell within FOISA.

The Commissioner’s conclusions

23. The information requested by the Applicant concerns the internal stairwell and electric lighting at a specific address. The information requested relates to the following in respect of the stairwell: responsibility, maintenance, inspections, repairs, complaints and investigation of complaints.
24. The Commissioner agrees with the Council that any information falling within the scope of the Applicant's request and which relates to lighting for the stairwell is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs, in particular paragraphs (b) and (f) of that definition (the relevant provisions are reproduced in Appendix 1 to this decision).
25. The Commissioner agrees with the Council that the stairwell, as part of a built structure, can be considered an element of the environment (2(1)(a) and (f)), and that the lighting, and electricity supplying it, is a factor that is likely to affect this element of the environment (2(1)(b)). Measures such as repairs, inspections and investigation of complaints can be considered to be activities likely to affect the elements and factors (2(1)(c)). The Commissioner also agrees that the state of repair of the stairwell and lighting and the

investigation and inspection of such (i.e. the condition of the built environment) are likely to impact human health and safety (2(1)(f)).

26. The Council was correct to refer to definition (f) of environmental information in regulation 2(1) of the EIRs. The Commissioner has recognised in previous decisions that environmental information does encompass 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). It should be noted too that [The Aarhus Convention: An Implementation Guide](#)³, which describes "built structures" as man-made constructions, indicates that the definition is not limited to large buildings and objects such as dams or bridges, but also covers small constructions (page 55).
27. The Commissioner is satisfied that such information is environmental information as defined by regulation 2(1) of the EIRs, and falls within paragraph (f) of the definition of environmental information ("conditions of built structures") in as much as such structures are, or may be affected by, the state of the elements of the environment referred to in paragraph (a) of regulation 2(1) of the EIRs, or, through those elements, by matters referred to in paragraphs (b) and (c) of the regulation.
28. As such the Commissioner finds that the information falling within the scope of the request is environmental and, as such, the Council was correct to respond to the request solely in terms of the EIRs.

Regulation 8 of the EIRs - Charging

29. In this case, the Council issued a fees notice in terms of regulation 8(1) of the EIRs. This allows a Scottish public authority to charge a fee for making environmental information available. Under regulation 8(3), any fee charged must not exceed a reasonable amount.
30. Having found that the information requested by the Applicant was environmental information, the Commissioner finds that the Council was entitled to charge a reasonable fee for producing the information available.
31. In her application, the Applicant did not question whether the fee was reasonable. Consequently, this is not a matter which can be considered by the Commissioner.

Decision

The Commissioner finds that East Lothian Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the Applicant.

³ https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

Appeal

Should either the Applicant 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

10 June 2022

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
- (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

...

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

- (1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

“applicant” means any person who requests that environmental information be made available;

“the Commissioner” means the Scottish Information Commissioner constituted by section 42 of the Act;

...

“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);
- (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;

...

- (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.

...

8 Charging

- (1) Subject to paragraphs (2) to (8), where a Scottish public authority is under a duty to make environmental information available under regulation 5(1), it may charge a fee for so doing.

...

- (3) Fees charged under paragraph (1) shall not exceed a reasonable amount and in any event shall not exceed the costs to the authority for producing the information requested.

...

17 Enforcement and appeal provisions

- (1) The provisions of Part 4 of the Act (Enforcement) including schedule 3 (powers of entry and inspection), shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in paragraph (2).
- (2) In the application of any provision of the Act by paragraph (1) any reference to -
 - (a) the Act is deemed to be a reference to these Regulations;

(b) the requirements of Part 1 of the Act is deemed to be a reference to the requirements of these Regulations;

...

(f) a notice under section 21(5) or (9) (review by a Scottish public authority) of the Act is deemed to be a reference to a notice under regulation 16(4); and

...

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