

Decision Notice 103/2023

Planning information: applications previously published online

Applicant: The Applicant

Public authority: East Renfrewshire Council

Case Ref: 202100810



Scottish Information
Commissioner

Summary

The Authority was asked for information about specified planning applications that had been published on, but were no longer available from, its website. The Authority told the Applicant that there would be a charge for providing this environmental information.

While the Commissioner accepted that the Authority did not have a duty to actively disseminate the information, he found that the Authority had not been entitled to notify the Applicant that the information he had requested was already publicly available and easily accessible to him.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 47(1) and (2) (Application for decision by Commissioner, as modified by regulation 17 of the EIRs)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information") (Interpretation); 4 (Active dissemination of environmental information) 5(1) and (2)(b) (Duty to make available environmental information on request); 6(1)(b) (Form and format of information); 8 (Charging)

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 24 May 2021, the Applicant made a request for information to the Authority as follows.

I see that your online application datasource holds information on planning applications and decisions from 2000 with supporting documents and plans for the last 3 years. Some of the information I am looking for relates to application which are more than 3 years old.

Could you please provide me with the planning consents and authorisations for the following applications, together with the planning officers' report on these proposals and the documentation submitted by the applicants in support of their information. I believe this information would normally be contained in the online data, were the applications to be less than 3 years old. The applications of interest are ... [4 applications relating to turbines were then listed].

2. The Authority responded on 27 May 2021. It explained that the information - copies of planning documents - fell within the Authority's "Charges for Services" and therefore the request was refused, as the information was otherwise available to the Applicant under regulation 6(1)(b) of the EIRs. The Authority stated that the charges for this service would be as follows: Consents: £75.50 each (£55.55 per file for file search and retrieval if not wanting a copy of a consent); Other documents charged either £1 per page for paper copies or £68.25/hour of officer's time to collate and send electronic documents.
3. Later that day, the Applicant wrote to the Authority requesting a review of its decision. He argued that regulation 4 of the EIRs required it to "actively disseminate environmental information relevant to your function" as a local planning authority. Regulation 4(2)(f) and (g) identified "authorisations" and "environmental impact studies" as types of information which the Authority was required to "organise and keep up to date" with active and systemic

dissemination of this information to the public. The Applicant also suggested that regulation 8 of the EIRs only allowed the Authority the right to charge for information made available “on request” under regulation 5(1) and, given the Authority’s responsibility to make the information available under regulation 4, no charge should therefore be applied.

4. The Applicant added that, to the extent that the information may be made available under regulation 5, rather than under regulation 4, the charges sought to be applied were unreasonable (regulation 8(3)).
5. On 25 June 2021, the Authority notified the Applicant of the outcome of its review. It confirmed that the information was environmental and that the provisions set out in regulation 8 of the EIRs had been correctly applied in the original response: as the Applicant had made a request for information under the EIRs, regulation 5 was engaged and the provisions of regulation 8 were therefore relevant. Regulation 4 requires the Authority to take reasonable steps to organise and keep up to date environmental information, as designated, with a view to active and systematic dissemination. This obligation was not therefore as strong as alleged by the Applicant and the Authority was:

...satisfied that the current processes operated by the planning service in terms of publication of materials are reasonable in all the circumstances. Information is withdrawn from online public access after a period of three years in order to ensure that data protection principles around disclosure of personal data are respected and the charges made for disclosure are both reasonable reflections of the costs involved in producing the information and are published in terms of the Council’s annual charging for services report.

6. The Authority stated that [guidance](#)¹ issued by the Commissioner (Charging for environmental information) clearly narrated that production of planning records may be chargeable under the EIRs. Regulation 8(3) of the EIRs allows authorities to charge a “reasonable amount” for making environmental information available. The European Court of Justice had also considered charging under the Directive, on which the EIRs were based, and whilst it was clear that no charge can be made for dealing with a request if the Authority does not hold the information requested, or if it decides that the information is subject to an exception in the EIRs, “that the information is environmental in nature does not otherwise negate the ability to charge for its issue”.
7. On 4 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 he was dissatisfied with the outcome of the Authority’s review for various reasons, which are set out – and considered - more fully below. In broad terms, the Applicant’s dissatisfaction remained the same as that raised in his requirement for review of 27 May 2021, i.e. he did not agree with the charge imposed and believed the information should be available online as before.

Investigation

¹ <https://www.itspubliknowledge.info/sites/default/files/2022-03/Chargingforenvironmentalinformation.pdf>

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to why the information had been withheld. The Applicant also provided arguments on why the information he had requested had wrongly been withheld.

Commissioner's analysis and findings

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

Application of the EIRs

11. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs (paragraphs (a) and (c) of the definition of "environmental information"). The Applicant asked for information about specific planning applications, which is information on measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting, or likely to affect, the elements of the environment, in particular land and landscape. The Applicant has not disputed the Authority's decision to handle the request under the EIRs, indeed he has argued strongly that his request does fall within the EIRs and his requirement for review stated this.

Regulation 4 - Active dissemination of environmental information

12. Regulation 4(1) of the EIRs reads as follows:

A Scottish public authority shall take reasonable steps to organise and keep up to date the environmental information, relevant to its functions, which it holds and at least the types of information listed in [regulation 4(2)], with a view to the active and systematic dissemination of that information to the public and shall make that information progressively available to the public by electronic means unless it was collected before 14th February 2003 and is not available in electronic form.

The Applicant's view

13. The Applicant argued that the information he had requested fell within the categories of information covered by regulation 4 of the EIRs, in particular regulation 4(2)(f) ("authorisations with a specific impact on the environment") and regulation 4(2)(g) ("environmental impact studies") and that the Authority was therefore under a duty to actively disseminate the information.
14. The Applicant noted that all of the information he had requested had been published on the Authority's online planning application database and had been available to the public by electronic means. In his view, regulation 4 of the EIRs did not permit an authority to stop actively disseminating information which it had previously actively disseminated.
15. The Applicant also provided reasons why retaining the information online, on the Authority's website, for three years was inadequate "by a long way". He suggested that planning

permissions are usually given a period to allow development to commence for any time within up to five years. When construction starts, it may be the case that the planning application documents are not available and those affected (for example, members of the public living in the vicinity) may want to know what the consent was issued for and how the decision was made. The Applicant made clear that he was not suggesting that information has to be online in perpetuity, but should be available for a minimum of 10 -15 years. Given the relatively small cost of holding information online for public access and the avoidance of cost of staff physically recovering information, it seems to him that the public interest that the information on planning applications and related decision should be available online for well beyond three years.

16. The Applicant also referred to the Commissioner's previous decision, [Decision 151/2018](#)², as involving a similar situation of information that was required to be made available four years after the consent was issued. In that case, the Commissioner found that the information should be made available and without charge. The Applicant suggested that this previous decision would be a precedent.
17. The Applicant suggested that there was a strong case for the Commissioner "to set out some clear guidance on policy in this area" especially given the "inconsistency between planning authorities on the retention of online of planning application information". The Applicant highlighted his view that the Commissioner could give clear guidance to specify the minimum time planning authorities retain public access to planning permission information.

The Authority's view

18. The Authority, in contrast, argued that its obligation to publish such information online was not as strong as the Applicant suggested. It was satisfied that the current processes operated by its planning service in terms of publication of materials are reasonable in all the circumstances. Information was withdrawn from online public access after a period of three years to ensure that data protection principles around disclosure of personal data are respected.

The Commissioner's view

19. The Commissioner notes that Scottish public authorities are not obliged to actively disseminate (or proactively publish) all the environmental information that they hold. The purpose of regulation 4 of the EIRs is to require authorities to make environmental information available proactively, so as to increase public awareness of, and involvement in, environmental issues.
20. The duty under regulation 4 is separate from the duty under regulation 5, which is to make specific environmental information available in response to a request for that information. Consequently, in a decision which considers whether a public authority complied with regulation 5 of the EIRs (section 47(1) of FOISA, as modified by regulation 17 of the EIRs, makes it clear, by its reference to regulation 16 and to "the information request" that the Commissioner's role here is to determine whether a public authority complied with regulation 5(1) of the EIRs), it would not be appropriate for the Commissioner to set out the type of guidance regarding the publication of planning guidance under regulation 4 which the Applicant has suggested.

² <https://www.itspubliknowledge.info/decision-1512018>

21. The Applicant referred to Decision 151/2018 and suggested that this decision would be a precedent. In that decision, the Commissioner noted, after finding that the authority had not complied with regulation 5, that it had already reviewed its policy of removing particular information from its website after 12 weeks and would remain published for a period of seven years. However, that was a step which the authority took voluntarily – it was not a step which the Commissioner could have required it to take when considering whether it had complied with regulation 5.
22. The Authority has in this instance published the information that relates to these planning applications. The Authority, as a planning authority, is regulated by the relevant planning legislation, which specifies the various rights, duties and powers of those involved in the planning process. The issue is whether the information at issue here – even were it to fall within a category as stipulated in regulation 4 – would be required to be published electronically and with a view to the active and systematic dissemination of that information to the public.
23. The Commissioner is not persuaded that in the circumstances this regulation can be read to require the Authority to republish the requested information. The manner in which the Authority makes available such planning information, online or otherwise, is informed and regulated in some cases by the planning legislation and its requirements.
24. The Applicant suggests that regulation 4 contains no provision for the removal of such environmental information, once published. There is, indeed, nothing in regulation 4 which specifically allows this. However, this does not, in the Commissioner’s view, prohibit an authority from, for example, removing text from its website. There may be good reasons, such as compliance with data protection laws (Article 5(1)(e) of the UK General Data Protection Regulation requires the Authority, as data controller, to process personal data for no longer than is necessary) which limits how long data can be published. (The Commissioner is aware that the Applicant does not agree that there are any data protection issues here.) In addition, the Commissioner notes the requirement in regulation 4(1) to keep the environmental information actively disseminated “up to date”: many, if not all, of the types of information to be actively disseminated (e.g. international treaties, plans relating to the environment, reports on the state of the environment) may all be superseded. Given the requirement to keep the information up to date, there appears to be no reason why older versions could not be taken off a website.
25. Having accepted the above, the Commissioner is not required to decide if the information requested would necessarily fall within the types of information listed in regulation 4(2).
26. The UK Information Commissioner (“the ICO”) regulates the Environmental Information Regulations 2004 (the UK EIRs). Regulation 4 of the UK EIRs is analogous to regulation 4 of the EIRs.
27. The ICO considered regulation 4 of the UK EIRs in a recent [decision](#).³ The complainant argued that a planning authority should proactively publish comments and objections to individual planning applications on its website, and that by failing to do so, it had failed to comply with its obligation under regulation 4. The ICO concluded that regulation 4 of the UK

³ <https://icosearch.ico.org.uk/s/redirect?collection=ico-meta&url=https%3A%2F%2Fico.org.uk%2Fmedia%2Faction-weve-taken%2Fdecision-notices%2F2022%2F4023297%2Fic-169355-s1j9.pdf&auth=ucnq8TnFLpt%2FmhwkvmEBwQ&profile=decisions&rank=2&query=%21padrenull+%7CpublicAuthority%3A%22%24%2B%2B+Stockport+Metropolitan+Borough+Council+%24%2B%2B%22>

EIRs did not require the authority to proactively publish comments and objections to planning applications.

28. While decisions of the ICO are not binding on the Commissioner, he agrees with the approach taken by the ICO and does not consider that there has been a breach of regulation 4 in this case.

Regulation 5(1) - Information falling within scope of the request

29. Regulation 5 of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by an applicant, subject to regulations 6 to 12.
30. Regulation 8 of the EIRs allows Scottish public authorities to charge a reasonable fee for making environmental information available provided it publishes a schedule of its fees. An authority may require the payment of a fee in advance and (if it does) is not required to make the information available unless a fee is paid.
31. The Authority advised the Applicant that, if he wished to proceed on a chargeable basis, to contact a specific Authority email address where more information would be provided about the service. A link to its schedule of fees was provided at review.
32. The Commissioner is satisfied that the Authority is entitled to charge a fee for making the information available. However, the Authority refused to make the information available on the basis that it was already publicly available and easily accessible to the Applicant (regulation 6(1)(b)). Given that the information was not published and that the Applicant would have to pay a (yet to be calculated) fee to obtain the information, the Commissioner cannot agree that regulation 6(1)(b) applied in this case.
33. The Commissioner therefore requires the Authority to issue a new (review) response to the Applicant, either making the information available or applying one of the provisions in regulations 8 (Charging), 10 (Exceptions from duty to make environmental information available) or 11 (Personal data) of the EIRs.

Decision

The Commissioner finds that the Authority partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant. The Authority was not entitled to notify the Applicant that the information was already publicly available and easily accessible under regulation 6(1)(b).

The Commissioner requires the Authority to take the steps set out in paragraph 33 above by 28 November 2023.

Appeal

Should either the Applicant or the Authority 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 Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

Daren Fitzhenry
Scottish Information Commissioner

13 October 2023

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant”.
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

47 Application for decision by Commissioner (as modified by regulation 17 of the EIRs)

- (1) A person who is dissatisfied with -
 - (a) a notice under [regulation 16(4) of the EIRs]; 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 [the EIRs].
- (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 [regulation 16(1) of the EIRs]; 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;

...

"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;

...

(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;

...

4 Active dissemination of environmental information

(1) A Scottish public authority shall take reasonable steps to organise and keep up to date the environmental information, relevant to its functions, which it holds and at least the types of information listed in paragraph (2), with a view to the active and systematic dissemination of that information to the public and shall make that information progressively available to the public by electronic means unless it was collected before 14th February 2003 and is not available in electronic form.

(2) The types of information referred to in paragraph (1) are-

(a) texts of international treaties, conventions or agreements, and of Community, national, regional or local legislation, on the environment or relating to it;

(b) policies, plans and programmes relating to the environment;

(c) progress reports on the implementation of the items referred to in sub paragraphs (a) and (b) when prepared or held by a Scottish public authority in electronic form;

(d) reports on the state of the environment;

(e) data or summaries of data derived from the monitoring of activities that affect or are likely to affect the environment;

(f) authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be requested or found;

(g) environmental impact studies and risk assessments concerning those elements of the environment referred to in paragraph (a) of the definition of "environmental information" in regulation 2(1); and

(h) facts and analyses of facts which the authority considers relevant and important in framing major environmental policy proposals.

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) –
...
(b) is subject to regulations 6 to 12.

...

6 Form and format of information

- (1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-
...
(b) the information is already publicly available and easily accessible to the applicant in another form or format.

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.
- (2) A Scottish public authority shall not charge a fee for allowing an applicant to-
 - (a) access any public registers or lists of environmental information held by it; or
 - (b) examine the information requested at a place which the authority makes available for that purpose.
- (3) Fees charged under paragraph (1) shall not exceed a reasonable amount and in any event shall not exceed the costs to the authority of producing the information requested.
- (4) A Scottish public authority may require that payment of the whole or part of a fee under paragraph (1) be made in advance of making information available.
- (5) Where a Scottish public authority imposes a requirement under paragraph (4) it shall notify the applicant in writing.
- (6) Where a Scottish public authority has notified an applicant that advance payment is required under paragraph (5) then that authority is not obliged to-
 - (a) make the information requested available under regulation 5(1); or
 - (b) comply with regulations 6, 7 or 13,unless the fee is paid; and any such fee must be paid within a period of 60 working days beginning with the day on which the authority gave such notification.
- (7) No working day from and including the day on which notice under paragraph (5) is given up to and including the day on which a fee is paid shall count for the purposes of

determining any period of working days in accordance with regulations 5(2)(a), 6(2)(a) and 13(a).

- (8) A Scottish public authority shall publish and make available to applicants-
 - (a) a schedule of its fees; and
 - (b) information on the circumstances in which a fee may be charged, waived or required to be paid in advance.