

Decision Notice 028/2022

Early years nurseries

Applicant: the Applicant

Public authority: East Renfrewshire Council

Case Ref: 202100328



Scottish Information
Commissioner

Summary

The Council was asked for a range of information regarding six new build nurseries. The Council answered parts of the request but withheld information on the basis that disclosure would cause substantial prejudice to commercial interests. The Council disclosed further information during the investigation.

Following an investigation, the Commissioner concluded that the Council had failed to respond to parts of the request. He required the Council to provide a new review outcome to the Applicant for those parts of the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 3(2)(b) (Scottish public authorities); 10(1) (Time for compliance); 21(1), (4) and (10) (Review by Scottish public authority); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a) to (c) of “environmental information”) and (2)(b) (Interpretation); 5(1) and (2) (Duty to make available environmental information on request); 16(1), (3), (4) and (5) (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 10 December 2020, the Applicant made a 15-part request for information to East Renfrewshire Council (the Council) in relation to six new build nurseries: Glenwood, Crookfur, Overlee, Busby, Eaglesham and Cross Arthurlie. The request is set out in full in Appendix 2.
2. The Council did not respond to the request.
3. On 28 January 2021, the Applicant wrote to the Council requesting a review of its failure to respond to his initial request.
4. The Council notified the Applicant of the outcome of its review on 25 February 2021. It provided a response to parts 4 to 8 of the request (which relate to legal advice obtained by the Council, but do not include the actual advice itself) and stated that other information was held, but that it was exempt from disclosure under section 33(1)(b) of FOISA (Commercial interests and the economy).
5. On 12 March 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 was dissatisfied with the outcome of the Council’s review because he disagreed with the Council’s reasons for withholding the information and because no information/documents had been disclosed. He was also dissatisfied with the failure to respond to the initial request.

Investigation

6. 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.
7. On 15 March 2021, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the information withheld from the Applicant. The Council provided information and the case was allocated to an investigating officer.
8. In correspondence with the Applicant, he confirmed that he was content to exclude the majority of the questions about the legal advice (requests 4 to 7), except for the question about the potential legal cost (request 8).
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.
10. Time was spent during the investigation establishing whether the Council held the correspondence requested in requests 9 to 15. This is considered in more detail below.
11. The Council also provided submissions as to why the information provided to the Commissioner should continue to be withheld from the Applicant. The Council was asked for further submissions in relation to the harm in disclosure. Following this, the Council disclosed the information previously withheld from the Applicant which fell within scope of requests 1 to 8 of the request on 8 and 16 September 2021.
12. The Applicant confirmed he had received the information from the Council, and was content to exclude this information from the Commissioner's investigation.

Commissioner's analysis and findings

13. 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 the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

14. "Environmental information" is defined in regulation 2(1) of the EIRs (parts (a) to (c) of the definition are reproduced in full in Appendix 1). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
15. The Commissioner's views on the relationship between FOISA and the EIRs are set out in detail in *Decision 218/2007 Transport Scotland*¹ and need not be repeated here. However, he will reiterate some of the key points which are relevant in this case:
 - (i) There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.

¹ [Decision 218/2007 \(itspublicknowledge.info\)](https://itspublicknowledge.info)

- (ii) Any request for environmental information, therefore, must be dealt with under the EIRs.
 - (iii) In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
16. The Council issued its review response under FOISA. However, during the investigation, the Council stated that, following further consideration, it was now of the opinion that the information regarding contractual cost was, in this context, environmental in nature insofar as the discussion regarding Covid related delay could have resulted in cessation of works and consequential impact on the built environment for at least a temporary period.
 17. The Council considered that this information could be described as a measure or activity (part (c) of the definition) which affects or is likely to affect a factor (part (b) of the definition) which itself affects or is likely to affect an element of the environment (part (a) of the definition). The Council referred to the Commissioner's briefing *What is Environmental Information*² and noted that it had subsequently handled a request for similar information in this way under the EIRs.
 18. The Council confirmed that it also wished to rely on section 39(2) of FOISA for responding to that part of the request.
 19. Having considered the nature and content of the withheld information, the Commissioner is satisfied that the information which discusses the effect of Covid on the contractual cost comprises environmental information as defined within regulation 2(1) of the EIRs.
 20. In the circumstances, the Commissioner also concludes that the exemption in section 39(2) of FOISA was correctly applied by the Council (during the investigation) to this information.
 21. The exception in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.
 22. The Applicant's request is wide ranging and is wider than the effect of Covid on the contractual costs. Therefore, the Commissioner considers that the remaining information is not environmental information, and requires to be considered under FOISA.

Searches

Requests 1 to 3 and 8

23. The Council explained that its searches were carried out on Microsoft outlook mailboxes and files and paper records held by the officers involved in the early years project team.
24. The officers conducting the searches were directly involved with the Project Managers for the developments (who, in turn, negotiated the further payments/costs with which this request is

² [Definition of Environmental Information \(itspublicknowledge.info\)](https://www.environmentalinformation.org.uk/definition-of-environmental-information)

concerned). The Council considered any relevant information would be held by these individuals.

25. Searches carried out on the systems of the current Council officer, the East Renfrewshire Council (ERC) Team leader, and the ERC Major Capital projects (MCP) Project Manager. They were considered to be the only relevant individuals as they were the direct links to the Project Managers (Gardiner & Theobald) and all communications to other council officers filtered through them.
26. The searches carried out by the Council covered April 2020 (when the additional cost issue first arose due to Covid restrictions) to March 2021. The Council provided a copy of the screen shot of an example of the searches that it had undertaken.
27. The Council considered that it had searched all relevant repositories within its systems for information relative to the early years project and relevant to the particulars of this request.
28. The Council also responded to questions during the investigation designed to check the accuracy of the information provided as falling within scope and, in particular, whether information referenced within correspondence was held by the Council. The Council confirmed that no further information was held.
29. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out.
30. The Commissioner considers, where appropriate, any reason offered by the public authority to explain why it does not hold further information or, as in this case, why only limited information is held. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information *is* (or was, at the time the request was received) actually held by the public authority.
31. Overall, having considered all the relevant submissions and the terms of the request, the Commissioner is satisfied that, by the end of the investigation, the Council had taken adequate, proportionate steps to establish what information it held that fell within the scope of requests 1 to 3 and 8. The information which it held was disclosed to the Applicant during the investigation.

Requests 9 to 15

32. Gardiner and Theobald was the lead project manager and they dealt with all the contractors for the project. Given the size of the project, a portal was used in which all correspondence and discussions took place.
33. The Council initially took the view that the information in the portal was not held by the Council for the purposes of FOISA or the EIRs. Consequently, it had not been referenced in its review response.
34. However, having considered the Commissioner's guidance on section 17 of FOISA and regulation 10(4)(a) of the EIRs, and the judgment of the Court of Session in *Graham v Scottish Information Commissioner [2019] CSIH 57*³, the Council accepted that it did hold the

³ [2019csih57.pdf \(scotcourts.gov.uk\)](#)

information in the portal for the purposes of regulation 3(2) of FOISA and/or regulation 2(2) of the EIRs (see Appendix 1).

35. In responding to a request under FOISA, an authority is required either to disclose the information within 20 working days or apply a provision in Part 1 or exemption in Part 2 of FOISA.
36. Similarly, in responding to a request under the EIRs, an authority is required either to make the information available or apply an exception in regulation 10 (or 11) of the EIRs.
37. The Commissioner has considered the review response issued to the Applicant on 25 February 2021. Although the Council states that information was being withheld under section 33(1)(b) of FOISA, it transpired during the investigation that the Council had not actually considered the information as it was held in the portal.
38. In its most recent correspondence with the Commissioner, the Council advised the Commissioner that it had not yet obtain a copy of the information requested in requests 9 to 15 from the portal in order to allow it to respond to the Applicant's request.
39. Therefore, in respect of the information in the portal which falls within the scope of requests 9 to 15, the Commissioner requires the Council to provide a revised review outcome to the Applicant in terms of section 21 of FOISA and/or regulation 16 of the EIRs and, in doing so, disclose that information to the Applicant unless a provision in Part 1 or exemption in Part 2 of FOISA and/or an exception in regulation 10 or 11 of the EIRs applies.

Time to respond

40. Section 10(1) of FOISA and regulation 5(2) of the EIRs state that a request must be responded to within 20 working days from receipt of the request.
41. It is a fact, that the Council did not respond to the initial request, within this timeframe. In its review response, the Council apologised that it had not responded to the initial request within the prescribed timescales. In its submissions, the Council submitted that this failure was as a result of communication issues caused by remote working and resource implications arising from the impact of the Covid pandemic.
42. The Commissioner therefore finds that the Council failed to respond to the Applicant's request within the timescales specified in section 10(1) of FOISA and/or regulation 5(2) of the EIRs.

Decision

The Commissioner finds that East Renfrewshire Council (the Council) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that the Council disclosed the information it held falling within parts 1 to 8 of the request.

However, the Commissioner also finds that the Council failed to respond to parts 9 to 15 of the request in line with FOISA and/or the EIRs. He requires the Council to issue a revised review outcome compliant with FOISA and/or the EIRs.

The Commissioner also finds that the Council failed to respond to the initial request in line with section 10(1) of FOISA and/or regulation 5(2) of the EIRs.

The Commissioner therefore requires the Council to issue a revised review outcome compliant with FOISA and/or the EIRs, by **22 April 2022**.

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.

Enforcement

If 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.

Daren Fitzhenry
Scottish Information Commissioner

8 March 2022

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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

3 Scottish public authorities

- ...
- (2) For the purposes of this Act but subject to subsection (4), information is held by an authority if it is held-
 - ...
 - (b) by a person other than the authority, on behalf of the authority.

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
 - (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
 - (b) in a case where section 1(3) applies, the receipt by it of the further information.
- ...

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.
- ...
- (4) The authority may, as respects the request for information to which the requirement relates-
 - (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
 - (b) substitute for any such decision a different decision; or

- (c) reach a decision, where the complaint is that no decision had been reached.

...

- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
 - (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.

...

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

-

- (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;

...

- (2) For the purpose of these Regulations, environmental information is held by a Scottish public authority if it is-

...

- (b) held by another person on that authority's behalf,

and, in either case, it has not been supplied by a Minister of the Crown or department of the Government of the United Kingdom and held in confidence.

...

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

...

16 Review by Scottish public authority

- (1) Subject to paragraph (2), an applicant may make representations to a Scottish public authority if it appears to the applicant that the authority has not complied with any requirement of these Regulations in relation to the applicant's request.
- ...
- (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.
 - (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.
 - (5) Where the Scottish public authority decides that it has not complied with its duty under these Regulations, it shall immediately take steps to remedy the breach of duty.

Appendix 2: text of information request

"This FOI concerns details contained in the Report by Director of Environment – EARLY LEARNING AND CHILDCARE (Expansion 2020) Dated December 2020, presented to East Renfrewshire Council (ERC) Cabinet Committee on 3 December 2020.

The FOI excludes Scottish Water negotiations/information.

It particularly concerns the details surrounding (but excludes Scottish Water negotiations)

The main new build nurseries situated at the following locations;

- Glenwood, adjacent to Glenwood Family Centre
- Crookfur, at the Parklands pavilion
- Overlee, at the Overlee Park pavilion
- Busby, at Busby Primary School
- Eaglesham, at Eaglesham Primary School
- Cross Arthurlie at Cross Arthurlie Primary School

and specifically

- the compensation payment of £803,000 to be made to Heron Bros [request 1]
- Property and Technical Services staff negotiated terms with the contractor for Cross Arthurlie and the other works packages [request 2]
- any other additional capital expenditure to cover the additional committed works [request 3]

also

This FOI is not looking for the actual legal advice given but looking for general information regarding advice received from legal services during the early stages of the pandemic was to adopt a cautionary position with regard to potential claims so as to control the Council's exposure to further costs and, If the additional sums are not approved it is possible that ERC could face a potentially costly legal dispute

- Details of who provided legal advice [request 4]
- The cost of this legal advice [request 5]
- Details of who provided the advice that ERC could face a potentially costly legal dispute [request 6]
- general details of why ERC could face a potentially costly legal dispute and what this potential costly legal dispute would involve [request 7]
- the potential cost of this potentially costly legal dispute [request 8]

Please provide all information/reports/documents/meeting notes/minutes held regarding above including all correspondence/emails to/from/between:

ERC Council Officials and ERC Council Officials [request 9]

ERC Council Officials and ERC Councillors [request 10]

ERC Council Officials and Heron Bros [request 11]

ERC Council Officials and Gardiner and Theobald (G&T) [request 12]

ERC Council Officials and legal services (Excluding the actual legal advice given) [request 13]

ERC Property and Technical Services staff and the contractor for Cross Arthurlie [request 14]

ERC Council Officials and any other parties involved (excluding Scottish Water) [request 15]

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