



Decision Notice 077/2022

High Hedge Application

Applicant: The Applicant

Authority: West Dunbartonshire Council

Case Ref: 202101123

Summary

The Applicant asked the Authority for information about a High Hedge Application. The Authority considered the request under FOISA. It disclosed some information with personal data redacted, and withheld other information on the basis that this was otherwise available to the Applicant. The Commissioner investigated and found that the Authority had considered the request under the wrong legislation. The requested information was environmental information and the Authority should have considered the request under the EIRs. The Commissioner required the Authority to respond to the request under the EIRs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) and (2)(a) (Effect of exemptions); 25(1) (Information otherwise accessible); 39(2) (Health, safety and the environment); 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”, “the Commissioner” and (paragraphs (a) and (c) of definition of “environmental information”) (Interpretation); 5(1) (Duty to make available environmental information on request); 16 (Review by Scottish public authority); 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 20 April 2021, the Applicant made a request for information to the Authority. The information requested was copies of all records, correspondence, notes and associated documents relating to High Hedge Application (HHA) HH20-001 between 17 October 2020 and 20 April 2021.
2. The Authority responded on 13 May 2021, refusing the request under section 25 (Information otherwise accessible) of FOISA. The Authority stated the information was already otherwise available on its E-Planning Online System, and provided a weblink to where, on its website, the information could be accessed.
3. On 13 May 2021, the Applicant wrote to the Authority, requesting a review of its decision on the basis that he disagreed with the application of the exemption in section 25 of FOISA. In support of this, he argued that the Authority's website only provided basic details, and not copies of any further documents relating to the HHA. He asked the Authority to provide the information requested.
4. That same day, the Authority informed the Applicant that it would again contact the department concerned for the information requested.
5. The Authority issued a further response to the Applicant on 17 May 2021, disclosing information and associated documents relating to the HHA. It explained that, as the Applicant's request also fell within data protection legislation, the information provided was disclosed under both regimes, and some information had been redacted (mainly signatures, telephone numbers, email addresses and third-party information which, the Authority stated, it did not have permission to release).
6. On 7 June 2021, the Applicant wrote to the Authority, summarising the progress of his request to date. Referring to the heavily redacted information disclosed on 17 May 2021, he questioned the extent of the redactions, particularly those made to information already provided to him in full. He further argued that information was missing from that which had been disclosed, including items explicitly referred to within that information. The Applicant asked the Authority to review its response, to provide all the information requested and to explain any redactions made.
7. The Authority issued its review outcome on 29 June 2021 modifying its original decision:
 - It disclosed further information, with some information redacted for data protection purposes. The Authority explained that it had treated the request as a standard FOI request made by an independent member of the public, where it did not have consent to disclose third party personal data. For information previously provided in full to the Applicant (as the hedge owner), the Authority explained this had now been disclosed in FOI-compliant form.
 - For information not included in its initial response and already held by the Applicant, the Authority explained it was not required to provide this in terms of section 25 of FOISA.
 - The Authority confirmed, with explanation, that it held no further information and that, through the HHA and FOI process, the Applicant had now received all photographs held on file.

8. On 8 September 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 Authority's review because:
- He disputed the extent of the redactions applied to the information disclosed.
 - He was unhappy that the Authority had failed to provide details noting the basis for each redaction.
 - It was unclear to the Applicant exactly what information the exemption in section 25 of FOISA was being applied to.
 - He believed the Authority must hold further relevant information.

Investigation

9. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
10. On 8 November 2021, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was subsequently allocated to an investigating officer.
11. 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. In particular, the Authority was asked to comment on whether it considered the request ought to have been handled in terms of the EIRs, given the information related to a planning matter.
12. The Authority responded on 31 March 2022. It explained that it had considered whether the requested information was environmental but, on this occasion, it was minded to respond under FOISA as it related to a direct dispute between two parties and did not impact on the wider community.

Commissioner's analysis and findings

13. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

FOISA or EIRs?

14. The relationship between FOISA and the EIRs was considered at length in [Decision 218/2007](#)¹. Broadly, in the light of that decision, the Commissioner's general position is as follows:

¹ <https://www.itspublicknowledge.info/decision-2182007>

- (i) The definition of what constitutes environmental information should not be viewed narrowly.
 - (ii) 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.
 - (iii) Any request for environmental information therefore must be handled under the EIRs.
 - (iv) In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
 - (v) If the authority does not choose to claim the section 39(2) exemption, it must respond to the request fully under FOISA: by providing the information; withholding it under another exemption in Part 2; or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these).
 - (vi) Where the Commissioner considers a request for environmental information has not been handled under the EIRs, he is entitled (and indeed obliged) to consider how it should have been handled under that regime.
15. Given the subject matter of the request, the Commissioner asked the Authority to consider whether the request properly fell to be handled as a request for environmental information, and therefore responded to under the EIRs. As noted above, the Authority did not agree that the request fell to be considered under the EIRs and responded solely under FOISA.
16. It is clear to the Commissioner from the information falling within the scope of the request, that this would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns an application for a high hedge and the Commissioner is satisfied that it would be environmental information, as defined in regulation 2(1) of the EIRs (paragraphs (a) and (c)), in that it relates to the state of the elements of the environment, and measures affecting, or likely to affect, those elements. The fact that the request relates to a dispute between two parties is not relevant here.
17. Given that the information requested is environmental information, the Authority had a duty to consider it in terms of regulation 5(1) of the EIRs. In failing to do so, it failed to comply with regulation 5(1).

Section 39(2) of FOISA - environmental information

18. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs.
19. In this case, as stated above, the Authority did not agree that the request fell to be considered under the EIRs and responded solely under FOISA. It provided the Commissioner with no submissions on whether or not it wished to rely on the exemption in section 39(2) of FOISA.
20. In the absence of any such submissions in this respect, the Commissioner finds that the Authority would have been entitled to apply this exemption to the request, given his conclusion that the information requested was properly classified as environmental information. As there is a separate statutory right of access to environmental information available to the Applicant, the Commissioner also accepts that, in this case, the public

interest in maintaining this exemption and in handling the request in line with the requirements of the EIRs outweighs any public interest in disclosing the information under FOISA.

Regulation 16 of the EIRs

21. Regulation 16 of the EIRs states that, on receipt of a requirement to conduct a review, the authority shall review the matter and decide whether it has complied with the EIRs, within 20 working days (regulations 16(3) and (4)). It also states that, where an authority has not complied with its duty under the EIRs, it shall immediately take steps to remedy the breach of duty (regulation 16(5)).
22. Although the Authority responded to the Applicant's requirement for review on 29 June 2021, as explained above, this was a result of the Authority considering the request solely in terms of FOISA and not under the EIRs.
23. It is apparent that the Authority failed to respond to the Applicant's request of 20 April 2021 in terms of the EIRs, and therefore failed to comply with regulation 5(1) of the EIRs. It is also apparent that the Authority failed to carry out a review meeting the requirements of regulation 16 of the EIRs.
24. The Commissioner therefore requires the Authority to provide a response to the Applicant's requirement for review of 7 June 2021 in terms of regulation 16 of the EIRs.
25. In light of the Applicant's dissatisfaction with the Authority's review response which it issued under FOISA, the Commissioner would also expect the Authority's review outcome (in terms of the EIRs) to:
 - address the Applicant's arguments that he believes further information is held which the Authority did not previously disclose;
 - include full reasons for its decision on review, including the justification of any exceptions/provisions in the EIRs that the Authority may wish to apply;
 - clearly list any information which the Authority considers is already available to the Applicant, and how that information is accessible to him (NB: this element would exclude any information identified and disclosed, under FOISA, by the Authority in its review outcome of 29 June 2021, given that this information would not have been readily available to the Applicant when he made his request); and
 - for any information being withheld or redacted under any exception/provision in the EIRs, to clearly identify which exception/provision is being applied for each individual redaction.
26. The Commissioner's decision below states a compliance date of 5 September 2022, in line with the timescales he is required to follow. This is the latest day on which the Authority must issue a response: the deadline does not prevent the Authority from issuing one sooner.

Decision

The Commissioner finds that the Authority failed to comply with the requirements of regulations 5(1) and 16 of the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the Applicant's information request and requirement for review.

The Commissioner requires the Authority to provide a response to the Applicant's requirement for review, in terms of regulation 16 of the EIRs, by **5 September 2022**.

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.

Margaret Keyse
Head of Enforcement

20 July 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.
- (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.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - ...
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (2) For the purposes of paragraph (a) of subsection (1), the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - (a) section 25;
 - ...

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.
- ...

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.

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;

...

- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

5 Duty to make available environmental information on request

- (1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

...

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.
- (2) Representations under paragraph (1) shall be made in writing to the Scottish public authority no later than 40 working days after either the date that the applicant receives any decision or notification which the applicant believes does not comply with these Regulations or the date by which such a decision or notification should have been made, or any other action should have been taken, by the authority but was not made or taken.
- (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.

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

...