



Decision Notice 008/2023

Proposal by youth club to lease ground at Crookfur Park

Authority: East Renfrewshire Culture and Leisure Trust
Case Ref: 202101340

Summary

The Applicant asked the Authority about a proposal by a youth club to lease the ground at Crookfur Park. The Authority disclosed some information and stated it held no further information falling within scope. The Commissioner investigated and found that, while the Authority did not hold any information falling within scope of the request, it had failed to make this clear to the Applicant and, in doing so, had failed to provide the requisite advice and assistance.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) section 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 “environmental information” (paragraphs (a), (b) and (c)) (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 9(1) and (3) (Duty to provide advice and assistance); 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available); 13(b) (Refusal to make information available); 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, the Applicant made a request for information to the Authority. He asked for all recorded information in relation to a proposal by a named youth club (the Club) to lease the ground at Crookfur Park. He specifically requested recorded information regarding the “plan” submitted by the Club, including all emails from staff to Club members and vice versa, also from staff to staff.

2. Having received no response from the Authority within 20 working days, the Applicant wrote to the Authority on 26 April 2021 requesting a review.
3. The Authority notified the Applicant of the outcome of its review on 11 May 2021. It apologised for not responding within statutory timescales which, it explained, had occurred as a result of the request having initially been directed to the wrong department for response. The Authority disclosed some information which, it stated, fell within the scope of the request. It explained that it held no direct written communication with the Club, as all correspondence held was between local authority officials and the Authority's Chief Executive. Noting that the request specifically asked for communication between the Authority and the Club (or internal Authority communications), the Authority explained it had included that information in the spirit of advice and assistance.
4. On 26 October 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 because he believed further information existed, given the subject being the disposal of public land, which had been discussed for some 18 months prior to his request.

Investigation

5. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
6. On 23 November 2021, the Authority was notified in writing that the Applicant had made a valid application and the case was subsequently allocated to an investigating officer.
7. 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 focussed on the steps taken by the Authority to establish whether it held any information which would satisfy the Applicant's request.

Commissioner's analysis and findings

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

Handling in terms of the EIRs

9. The Authority considered the Applicant's request in accordance with the EIRs, on the basis that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
10. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
11. The Authority submitted that the request sought information relating to a plan/proposal for the future use of land. In light of this, it considered the request to be for environmental information, as it reflected measures regarding the potential use of the natural and built

environment. As such, the Authority considered it would fall within the definition of environmental information in regulation 2(1) of the EIRs.

12. The Commissioner accepts this as a reasonable description and, in the circumstances, is satisfied that the information requested by the Applicant falls within the definition of environmental information set out in regulation 2(1), in particular paragraphs (a), (b) and (c) of that definition. The Applicant has not challenged the Authority's decision to deal with the request as one for environmental information and the Commissioner will consider the handling of the request in what follows solely in terms of the EIRs.

Regulation 5(1) – Duty to make available environmental information

13. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any Applicant. This obligation relates to information that is held by the authority when it receives a request.
14. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information which an applicant believes the authority should hold.
15. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to make that information available, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).

Regulation 10(4)(a) – Information not held

16. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when the request is received.
17. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. 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.
18. In his application to the Commissioner, the Applicant believed the Authority should hold many more recorded documents, given the subject being the disposal of public land having been discussed for some 18 months prior to his request.
19. In its submissions to the Commissioner, the Authority stated that it wished rely on regulation 10(4)(a) of the EIRs as it held no information falling within the scope of the request.
20. The Authority's position was that, as it did not own, lease, licence or otherwise have any responsibility for the facilities, or have any legal interest in the land in question, it had no locus in the proposed arrangement for Crookfur Park.
21. It explained that any internal communications held would have related to the possible financial impact on the Authority (in terms of reduced income) arising from the Club's move

to the proposed facility, thus reducing its use of other facilities managed by the Authority. However, the Club did not approach the Authority at all regarding these issues, as the Authority had no say in the proposal. No internal deliberations took place as the Club abandoned the proposal and it was not progressed, reducing the likelihood of internal correspondence as, ultimately, those issues did not require to be considered.

22. Addressing the Applicant's assertion that more information must be held, the Authority considered that this was based on the Applicant's belief that it had some interest in the arrangements which would require the Club to approach it. As the proposal was for the Club to acquire a local authority asset, the Authority had no locus and was not involved in this. The local authority owned and had responsibility for the pitches, hence the Club's discussions with the local authority.
23. The Authority described and provided supporting evidence of the searches it had undertaken to identify and locate any relevant information. It explained that, in the first instance, searches were conducted of all physical files and electronic mail (Outlook folders) held by its Chief Executive, as this was the officer who would have been involved in any discussions relevant to the request. While it was considered unlikely that any other officers would have been approached in connection with this matter without the Chief Executive's knowledge, searches of the Authority's shared drives were also carried out. None of these searches, using the search terms "[Club name]" and "Crookfur Park", returned any documents.
24. The Authority was asked to explain the statement, in its review outcome, in which it had informed the Applicant that it held information falling within the scope of the request (which it had disclosed at that time).
25. In response, the Authority explained that, while it did hold certain information falling within the more general criteria of the request (i.e. plans for the land), this did not fall within the secondary criteria of the request (i.e. communications between the Club and the Authority, or between Authority staff). This information, which was disclosed at review in the spirit of advice and assistance, comprised communications between the Authority and the local authority, and did not fall within the full scope of the request.
26. In conclusion, the Authority was satisfied that, given the circumstances, the parameters of the request and the results of the searches carried out, these were sufficient to allow it to conclude that no information was held and, as such, regulation 10(4)(a) applied.

The Commissioner's view

27. The Commissioner has considered the submissions from both the Applicant and the Authority, including the clarification by the Authority that the correspondence disclosed at review stage did not technically fall within the full scope of the request. He is satisfied that, while this information falls within scope in terms of the first qualification (the subject matter), it does not meet the second qualification (in that it is correspondence between the Authority and the local authority).
28. The Commissioner also accepts that, given the explanations provided, the searches carried out by the Authority would appear to be capable of identifying any information falling within scope, were it held. While it is entirely possible that further information might exist regarding the "disposal of the land" (as referred to by the Applicant in his application), in the Commissioner's view, this would more likely be held by the local authority (as owner) and, in any case, is not the information which has been requested here.

29. As such, the Commissioner is satisfied that the information requested by the Applicant was not held by the Authority when he made his request. However, the Commissioner considers that, at the time it issued its review outcome (at the latest), the Authority should have notified the Applicant that the information was excepted from disclosure in terms of regulation 10(4)(a) of the EIRs, on the basis that it was not held.

Public interest test

30. The exception in regulation 10(4)(a) of the EIRs is subject to the public interest test in regulation 10(1)(b) and so can only apply if, in all the circumstances of the case, the public interest in maintaining the exception outweighs that in making the information available. The question of whether or not a public authority holds information is a factual one, determined on the balance of probabilities. If a public authority does not hold the information, then there is no meaningful public interest test that can be undertaken.
31. In this case, for the reasons set out above, the Commissioner is satisfied that the Authority does not (and did not, on receiving the request) hold any information covered by the request. Consequently, he accepts that there is no conceivable public interest in requiring the disclosure of such information and finds that the public interest in making information available is outweighed by that in maintaining the exception.
32. The Commissioner is satisfied that the Authority was entitled to rely on the exception in regulation 10(4)(a) on the basis that it did not hold the information requested.
33. However, in failing to provide the Applicant with a refusal notice which stated that the exception in regulation 10(4)(a) applied, the Commissioner finds that the Authority failed to comply with regulation 13(b) of the EIRs.

Regulation 9 – Duty to provide advice and assistance

34. Regulation 9(1) of the EIRs requires Scottish public authorities to provide advice and assistance to applicants, so far as it would be reasonable to expect them do so.
35. Regulation 9(3) provides that a Scottish public authority shall be taken to have complied with this duty if it conforms to the guidance contained in the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs (the Section 60 Code of Practice).
36. The [Section 60 Code of Practice](#)¹ states that authorities have a duty to provide advice and assistance at all stages of a request - this ranges from before a request is made to after an authority has responded (paragraph 5.1.1).
37. The Commissioner has considered the Authority's compliance with regulation 9 in relation to its handling of the Applicant's request, with particular regard to its statement, in its review outcome, where it informed the Applicant that it had identified information falling within scope, which it disclosed to him.
38. In its submissions, the Authority explained that, in the spirit of advice and assistance, it had supplied the Applicant with the information held, even though that information did not meet the secondary criteria of the request. It submitted that its response, at review, was intended to reflect that fact, and that the information was being released voluntarily in the spirit of openness. The Authority stated that it was not the intention to suggest that the information

¹ <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice>

disclosed fell squarely within the scope of the request in its entirety, which is why explicit reference was made to “advice and assistance” in the review outcome.

39. The Commissioner notes the Authority’s explanation that, although the information disclosed did not fully fall within the scope of the parameters of the request, it was provided to the Applicant by way of assistance. However, this was not made clear to the Applicant at the time. The Authority’s review outcome clearly claimed that it held information which fell within scope, yet it went on to explain that the same information did not meet the terms of the request and was being disclosed “in the spirit of advice and assistance”. In the Commissioner’s view, in spite of the Authority’s well-meaning intentions, this was a confusing response which would lead any reasonable person to believe that the Authority did, in fact, hold relevant information. Had the Authority made this clear at the time, this may have avoided an application being made to the Commissioner, and may have resulted in a saving in time and resources for all concerned.
40. Therefore, in light of the Authority’s failure to provide the Applicant with a clear review response, the Commissioner finds that the Authority failed to fulfil its duties under regulation 9 of the EIRs in relation to the Applicant’s request.

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 Commissioner is satisfied that the Authority does not hold any information falling within the scope of the request, and therefore regulation 10(4)(a) of the EIRs applied.

However, the Commissioner finds that, by failing to provide the Applicant with a refusal notice which stated that an exception under regulation 10(4) or (5) of the EIRs applied, the Authority failed to comply with regulation 13(b) of the EIRs.

He further finds that, in providing an unclear review outcome, the Authority failed to comply with the duty in regulation 9 of the EIRs to provide advice and assistance.

The Commissioner does not require the Authority to take any action in respect of these failures in response to the Applicant’s application.

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.

Margaret Keyse
Head of Enforcement

8 February 2023

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;
- ...

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.
- ...

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.
...
 - (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

(a) it does not hold that information when an applicant's request is received;

...

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-

...

(b) specify the reasons for the refusal including, as appropriate, any exception under regulation 10(4) or (5) or provision of regulation 11 and how the Scottish public authority has reached its decision with respect to the public interest under regulation 10(1)(b);

...

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

...