

Decision Notice

Decision 021/2018: Mr T and Highland Council

[REDACTED]

Reference No: 201800958

Decision Date: 14 February 2019



Scottish Information
Commissioner

Summary

The Council was asked for [REDACTED] following the applicant's previous requests on the subject. The Council disclosed some information but also considered part of the request was manifestly unreasonable and refused to comply with it.

The Commissioner agreed that part of the request was manifestly unreasonable, given its timing and effect.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (parts (a) and (c) of the definition of "environmental information"); 5(1) and (2) (Duty to make available environmental information on request); 10(1), (2) and (4)(b) (Exceptions from duty to make environmental information available)

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. The request under consideration here follows on from the Commissioner's [REDACTED] issued on [REDACTED]. In that decision the Commissioner required the Council to [REDACTED].
2. [REDACTED] Mr T made a further request for information to the Council. Mr T referred to [REDACTED], noted that further information was located as a result of searches during the investigation of that case and asked to see [REDACTED].
3. On 23 April 2018, Mr T wrote to the Council, requesting a review on the grounds that he had not received a response to his request of 21 March 2018.
4. The Council notified Mr T of the outcome of its review on 22 May 2018, with an apology for the earlier failure to respond. The Council disclosed some information for part 3 of the request, redacting some data which it considered to be personal data in terms of regulation 11(2) of the EIRs. It provided a copy of information provided previously in relation to part 5 of the request but in all other respects notified Mr T that it was applying the exception in regulation 10(4)(b) of the EIRs, on the basis that it considered the request to be manifestly unreasonable. It considered the amount of time and effort required for further searches (part 5) to be disproportionate in relation to the value of the information they would provide, while (in relation to the remaining parts of the request) noting the overlap with the compliance actions it was already required to carry out for [REDACTED].
5. On 5 June 2018, following further correspondence with the Council, Mr T wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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. Mr T stated he was dissatisfied with the outcome of the Council's review, setting out at length why he considered the response to be unsatisfactory.

6. From Mr T's submissions, he would not appear to be challenging the Council's response to part 3 of his request. Parts 1, 2 and 4 all relate to compliance with [REDACTED], which has been addressed separately as part of the enforcement of that decision. It would not be appropriate to revisit that compliance here, and indeed Mr T does not appear to have asked the Commissioner to do so. What the Commissioner has been asked to consider is the Council's application of regulation 10(4)(b) of the EIRs to part 5 of the request.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr T 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.
8. On 3 August 2018, the Council was notified in writing that Mr T had made a valid application. The case was allocated to an investigating officer.
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, focusing on its application of regulation 10(4)(b) of the EIRs.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both Mr T and the Council. He is satisfied that no matter of relevance has been overlooked.
11. Under the exception in regulation 10(4)(b) of the EIRs, a Scottish public authority may refuse to make environmental information available to the extent that the request for information is manifestly unreasonable. In considering whether the exception applies, the authority must interpret it in a restrictive way and apply a presumption in favour of disclosure. Even if it finds that the request is manifestly unreasonable, it is still required to make the information available unless, in all the circumstances, the public interest in doing so is outweighed by that in maintaining the exception.
12. The Commissioner's general approach¹ is that the following factors are relevant when considering whether a request is manifestly unreasonable under regulation 10(4)(b). These are that the request:
 - (i) would impose a significant burden on the public body
 - (ii) does not have a serious purpose or value
 - (iii) is designed to cause disruption or annoyance to the public authority
 - (iv) has the effect of harassing the public authority
 - (v) would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.
13. This is not an exhaustive list. Depending on the circumstances, other factors may be relevant, provided the impact on the authority can be supported by evidence. The

¹ http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Manifestly_unreasonable_requests.aspx

Commissioner recognises that each case must be considered on its merits, taking all the circumstances into account.

Part 5 of the request

14. The Council considered this part of the request to be manifestly unreasonable, noting that it would include all information about [REDACTED] (when it received the request under consideration here). Indeed, given Mr T's separate reference to a previous information request, it would potentially need to go back further than that. As a result of reaching this conclusion, the Council stated that no further searches were carried out.
15. The Council offered the following reasons for concluding that the request was manifestly unreasonable:
 - (i) Searches would be required to provide the updates Mr T sought. During the period the searches would need to cover (above), it had received a further 15 information requests from Mr T about the same issue and provided him with further information throughout the year. These responses had, in the Council's view, indicated the current position with regard to [REDACTED]. It acknowledged that this position might not be satisfactory to Mr T, but submitted that further searches would be unlikely to reveal new information about the circumstances surrounding [REDACTED]: any staff time expended would, therefore, be for little gain.
 - (ii) The Council, submitting that the request had caused disruption and annoyance, noted that this request had been received from Mr T [REDACTED], at which point Mr T would have known the Council was required to provide him with information as a result of that decision. It submitted that making a further request relating partly to the subject matter of [REDACTED] but also requiring it to carry out searches "would understandably cause annoyance". It submitted that the request impacted negatively on its compliance with [REDACTED].
 - (iii) The Council also referred to numerous requests and enquiries received from Mr T. These might seem straightforward, but were often (in its view) questions rather than requests for information. However, Mr T was critical when it attempted to provide answers to these questions from the knowledge or opinions of its officers. The Council also highlighted his use of public fora, including Whatdotheyknow and Facebook to voice his opinions on the topic: it submitted that he did not separate the FOI process from the legal process relating to [REDACTED] and criticised the Council's staff publicly. In the Council's view, the request – in conjunction with Mr T's other correspondence – had the effect of harassing its staff and causing them stress, which had clearly had an effect on their other work. Staff could not have frank exchanges with him, because every conversation was in public and this meant staff had to be circumspect: this imbalance of power was, in itself, stressful.
16. Mr T considered the Council's response to have been based on a "presumptive judgement" of who he was and what they presumed he possessed, rather than a judgement of the request he had made. He did not believe the Council had justified its statement that responding to the request would involve disproportionate time and effort, and submitted that another person seeking the information would have been given it without concerns. He did not believe it was unreasonable to ask to be brought up to date, [REDACTED] after his original request.

The Commissioner's conclusions

17. There is no definition of "manifestly unreasonable" in the EIRs, or in Directive 2003/4/EC² from which the EIRs are derived. The Commissioner's view is that "manifestly" implies that a request should be obviously or clearly unreasonable. He notes the opinion of the Information Tribunal in *Dr Kaye Little v Information Commissioner and Welsh Assembly Government (EA/2010/0072)*³, which considers the equivalent regulation of the (UK) Environmental Information Regulations 2004, and states:

‘From the ordinary meaning of the words "manifestly unreasonable", it is clear that the expression means something more than just "unreasonable". The word "manifestly" imports a quality of obviousness. What is in issue, therefore, is a request that is plainly or clearly unreasonable. It is a more stringent test than simply "unreasonable".’
18. Whether a request is manifestly unreasonable will depend on the facts of each case. It may apply where it can be demonstrated that a request is vexatious, or where compliance would incur unreasonable costs for the public authority or an unreasonable diversion of public resources. *Decision 024/2010 Mr N and the Scottish Ministers*⁴ established that the Commissioner was likely to take into account the same kinds of considerations in deciding whether a request was manifestly unreasonable under the EIRs as in reaching a decision as to whether a request was vexatious in terms of section 14(1) of FOISA.
19. Taken in isolation, a request for an update on previous requests may not appear to be manifestly unreasonable. The Commissioner is aware, however, that the unreasonable nature of a request may only emerge after considering it in all the relevant circumstances. In this case, while noting the wider issues described by the Council, the timing of the request appears to the Commissioner to be crucial.
20. When he made this request, it would have been readily apparent to Mr T that the Council had [REDACTED], which related to the same issues as the request under consideration here and required the Council to carry out a considerable amount of work. It may be that at least some of that work should have been done by the Council earlier, but [REDACTED] provided the framework within which it now required to be done (and for the Commissioner securing that it was done). There may have been subsequent delays in securing compliance, but that could hardly have been anticipated at the time the request was made.
21. In the Commissioner's view, it would have been apparent to any reasonable person, aware of [REDACTED] as Mr T was, that an overlapping request [REDACTED] that decision was issued would be likely to cause confusion and disrupt the Council's effective compliance with the decision. It would not be unreasonable, in the circumstances, for Council staff receiving the request to perceive it as harassment. It might have been appropriate to respond to a similar request, from Mr T or someone else, differently if it had been received within a different timeframe, but that would depend on the circumstances prevailing then: here, the Commissioner is considering the particular circumstances surrounding this particular request.
22. The Commissioner has also taken account of the Council's submissions regarding the 15 additional information requests made by Mr T over the period its searches would require to

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0004:EN:HTML>

³

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i475/%5b2010%5dUKFTT_EA20100072_\(GRC\)_20101230.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i475/%5b2010%5dUKFTT_EA20100072_(GRC)_20101230.pdf)

⁴ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2010/200900461.asp>

cover (see paragraph 15(i) above). While the Commissioner cannot comment in any detail on the extent to which the Council's handling of these additional requests met the requirements of the EIRs, they do appear to contribute to a context in which the Council was endeavouring to respond to Mr T's requests. It was also a context in which it would have been understandable for the Council and its staff to consider themselves subject to harassment on the issue of [REDACTED].

23. In the circumstances, it is clear to the Commissioner that this request gave minimal regard to the duties (or rights) of a Scottish public authority receiving a decision notice under section 49 of FOISA. Its impact on an ongoing legal process should have been apparent, as should the likely effect of causing harassment to the Council and its staff. Consequently, the Commissioner is satisfied that the Council was correct in concluding that the request was manifestly unreasonable, in terms of regulation 10(4)(b) of the EIRs.

Public interest test

24. In common with all the other exceptions in the EIRs, regulation 10(4)(b) is subject to the public interest test set out in regulation 10(1)(b). Information can be withheld under the exception only where, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
25. Mr T did not comment directly on the public interest test, but his reasons for requiring disclosure of the information are apparent, as set out above.
26. The Council noted that it had published a good deal of information on the topic, in response to information requests. It had also provided information to [REDACTED] outwith the EIRs and believed it had met the public interest with regard to providing information on its position and actions relating to [REDACTED]. On the other hand, it highlighted its duty to protect its staff from harassment and emphasised the importance of the public understanding that rights (including information rights) carried responsibilities with them. They should be used in a measured way and not as weapons to attack public authorities and their staff.
27. In the Commissioner's view, there is an inherent public interest in disclosure of information which would enhance transparency in relation to a public authority's actions, and which would permit adequate public scrutiny of those actions. [REDACTED] in question is clearly a matter of public interest.
28. There is also a strong public interest, however, in the Council – and indeed all Scottish public authorities – being able to comply with the Commissioner's decision notices, as and when he instructs them to take action. Mr T's request clearly ran counter to this public interest. As the Commissioner has found above, it would be reasonable to interpret the request as having the effect of harassing the Council and its staff. Whatever the applicant wished to achieve through the request, it was clearly not in the public interest to place staff under the degree of stress they evidently felt as a result of receiving it.
29. On balance, the Commissioner is satisfied that, in all the circumstances of this case, the public interest in making the information available was outweighed by the public interest in maintaining the exception in regulation 10(4)(b) of the EIRs. The Council was, therefore, entitled to apply that exception to refuse to make the requested information available.

Decision

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

Appeal

Should either Mr T 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.

Daren Fitzhenry
Scottish Information Commissioner

14 February 2019

Appendix 1: Relevant statutory provisions

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;

...

(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)-

(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.

...

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

...

(b) the request for information is manifestly unreasonable;

...

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