

Decision Notice

Decision 028/2017: Mr Severin Carrell and Shetland Islands Council

Contract information

Reference No: 201602115
Decision Date: 7 March 2017



Scottish Information
Commissioner

Summary

Shetland Islands Council (the Council) was asked for contract information relating to the new Anderson High School project. The Council withheld some of the information requested on the basis that it was exempt in terms of section 33 of the Freedom of Information (Scotland) Act 2002 (FOISA).

The Commissioner found that the Council had considered the request under the wrong legislation. The requested information was environmental information and so the Council should have considered it under the Environmental Information (Scotland) Regulations 2004 (the EIRs)

The Commissioner required the Council to respond to the request under the EIRs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 16 (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 Appendix forms part of this decision.

Background

1. On 5 September 2016, Mr Carrell made a request for information to the Council. The information requested was:

... a copy of the entire original contract for the new Anderson High School project with the prime contractor (in this case Hub North Scotland (Anderson) Ltd), including the full financial model and any related correspondence appendices, annexes or other financial information in full.

... details in full of any subsequent refining deals for the Anderson High School project, including any related correspondence, reports or other financial information in full.
2. On 12 October 2016, Mr Carrell wrote to the Council and requested a review on the basis that it had failed to respond to his request.
3. The Council responded to Mr Carrell's requirement for review on 14 October 2016. It provided some redacted information to Mr Carrell, explaining that the information redacted, and other information was being withheld as it considered it to be exempt in terms of section 33 of FOISA. The Council drew attention to Schedule 26 to the contract it had provided, which stated that commercially sensitive information was exempt as disclosure would, or would be likely to, prejudice substantially the commercial interests of persons involved in and connected to the project. This response, wrongly, advised Mr Carrell of the right to request a further review.

4. On 19 October 2016, Mr Carrell wrote to the Council requesting a review of its decision. In particular, Mr Carrell stated that no financial information whatsoever had been provided and did not accept that a blanket refusal could be applied.
5. The Council notified Mr Carrell of the outcome of its further review on 15 November 2016. The Council essentially upheld its original decision, explaining further why it considered substantial prejudice would be caused if the information was disclosed prior to the timescale set in Schedule 26 to the contract (two years).
6. On 16 November 2016, Mr Carrell wrote to the Commissioner's office. He applied to the Commissioner 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. Mr Carrell stated he was dissatisfied with the outcome of the Council's review because he considered its application of section 33 of FOISA to have been unnecessarily rigid, ignoring options to release non-commercially sensitive information.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr Carrell made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision. On 12 December 2016, the Council was notified in writing that an application had been received from Mr Carrell. The case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 2 February 2017, the Council was invited to comment on this application and answer specific questions.
9. In particular, the Council was asked if it had considered whether Mr Carrell's information request should have been handled as a request for environmental information, to be responded to under the EIRs. The Council's attention was drawn to *Decision 011/2017: Mr Rob Edwards and Lothian Health Board*¹, where the Commissioner found that a similar request fell to be considered under the EIRs.
10. The Council responded on 8 February 2017. The Council agreed that the information requested was environmental information and that the request should have been handled in terms of the EIRs. It confirmed that it should, therefore, have applied the exemption in section 39(2) of FOISA (see below).
11. The Council also confirmed that it would take steps to deal with Mr Carrell's request in terms of the EIRs and issue him with an appropriate response. The Council stated that it intended to provide Mr Carrell with a compliant review outcome as soon as possible.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2017/201602129.aspx>

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to her by both Mr Carrell and the Council. She is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

13. The relationship between FOISA and the EIRs was considered at length in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*². Broadly, in the light of that decision, the Commissioner's general position is as follows:
- (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, she is entitled (and indeed obliged) to consider how it should have been handled under that regime.
14. Given the subject matter of the request, the Commissioner asked the Council to consider whether the request properly fell to be handled as a request for environmental information, and therefore responded to under the EIRs. The Council agreed that it should have responded under the EIRs and not solely under FOISA. In doing so, it confirmed it should have applied section 39(2) of FOISA.
15. It is clear from the Council's correspondence with the Commissioner that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns the construction of a high school, and the Commissioner is satisfied that it would fall within either paragraph (a) of the definition of environmental information contained in regulation 2(1) of the EIRs (as information on the state of the elements of the environment) or paragraph (c) of that definition (as information on measures affecting or likely to affect those elements).
16. Given that the information requested is environmental information, the Council had a duty to consider it as a request in terms of regulation 5(1) of the EIRs. In failing to do so, it failed to comply with regulation 5(1).

² <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>

Section 39(2) of FOISA - environmental information

17. 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. In this case, the Council informed the Commissioner that in responding to Mr Carrell's request it should have relied upon section 39(2) of FOISA, and provided him with a response in compliance with the EIRs.
18. In this case, the Commissioner accepts that the Council is entitled to apply this exemption to Mr Carrell's request, given her conclusion that the information requested is 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

19. 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)).
20. Although the Council responded to Mr Carrell's request for review on 14 October, as explained above, this was as a result of the Council considering the request under FOISA and not the EIRs.
21. It is apparent that the Council failed to respond to Mr Carrell's request of 5 September 2016 in terms of the EIRs, and therefore failed to comply with regulation 5(1) of the EIRs. It is also apparent that the Council failed to carry out a review meeting the requirements of regulation 16 of the EIRs.
22. The Commissioner therefore requires the Council to provide a response to Mr Carrell's requirement for review of 12 October 2016, in terms of regulation 16 of the EIRs. She would expect such a review outcome to include full reasons for its decision on review, including justification for any exception in the EIRs the Council may wish to apply.
23. The Commissioner's decision below states a compliance date of 21 April 2017 in line with the approach and timescales she is required to follow. This is the latest day on which the Council must issue a response but does not prevent it issuing one sooner. The Commissioner would encourage the Council to provide Mr Carrell with a response as soon as possible, as it indicated to the Commissioner in its letter to her of 8 February 2017.

Decision

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

The Commissioner requires the Council to provide a response to Mr Carrell's requirement for review, in terms of regulation 16 of the EIRs, by **21 April 2017**.

Appeal

Should either Mr Carrell 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.

Margaret Keyse
Head of Enforcement

7 March 2017

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.

...

- (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.

...

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;

...

- (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.

...

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.

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