

Decision Notice

Decision 035/2015: Mr Paul Case and City of Edinburgh Council

Planning decision

Reference No: 201402117

Decision Date: 16 March 2015



Scottish Information
Commissioner

Summary

On 19 May 2014, Mr Case asked City of Edinburgh Council (the Council) for all internal communications, including draft reports, relating to three planning applications.

The Council responded by refusing to disclose the information on the basis that it comprised internal communications. It also stated that it did not hold any draft reports. Following a review, as a result of which the Council claimed that disclosure would also cause substantial prejudice to the course of justice, Mr Case remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council responded to Mr Case's request for information in accordance with the EIRs.

Relevant statutory provisions

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); 10(1), (2) and (4)(e) (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. On 19 May 2014, Mr Case made two information requests to the Council. The information requested was:
 - (i) All internal communication, including draft reports, from the Economic Development Service in connection with planning application 13/02381/FUL, modification application 13/03450/OBL and modification application 13/03451/OBL (request 1);
 - (ii) All internal communications, including draft reports, in connection with planning application 13/02381/FUL, modification application 13/03450/OBL and modification application 13/03451/OBL (request 2)
 2. The Council responded to both requests on 4 June 2014. In relation to each, the Council withheld the information, applying regulation 10(4)(e) (internal communications) and, in relation to draft reports, regulation 10(4)(a) (information not held).
 3. On 12 June 2014, Mr Case wrote to the Council requesting a review of both decisions, on the basis that he believed the public interest favoured disclosure. He did not challenge the Council's conclusion that it did not hold any relevant draft reports.
 4. The Council notified Mr Case of the outcome of its review on 11 July 2014. The Council confirmed that the information was exempt under regulation 10(4)(e), but also stated that disclosure would prejudice the course of justice substantially (regulation 10(5)(b) of the EIRs).
 5. On 12 September 2014, Mr Case wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA in relation to both requests.
- Print date: 16/03/15

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 Case stated he was dissatisfied with the outcome of the Council's review because he believed the public interest test favoured disclosure of the information.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Case made requests for information to a Scottish public authority and asked the authority to review its response to those requests before applying to her for a decision.
7. On 12 September 2014, the Council was notified in writing that Mr Case had made a valid application. The Council was asked to send the Commissioner the information withheld from him. The Council provided the information and 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. The Council was invited to comment on this application and answer specific questions, with a view to determining whether it could justify its reliance on any provisions of the EIRs it considered applicable to the information requested.
9. When asked to provide the withheld information, the Council supplied the Commissioner with numerous documents which fell outwith the scope of the request, duplicate documents and documents which were already in the public domain (through the Council's own planning portal) at the time of the request. Although supplied to the Commissioner as withheld information, none of this information is considered in this investigation.
10. On 19 December 2014, the Council confirmed to Mr Case which of the information covered by his request was already in the public domain.
11. During the investigation, the Council also sought to rely on regulation 11(2) of the EIRs to withhold personal information. The applicant was given an opportunity to comment on the application of this exception.
12. The Council sought to apply this exception to details of members of the public and Council employees below the level of Head of Service. The applicant accepted that the Council was justified in withholding personal data in relation to a "normal officer" of the Council, but not in relation to a senior official who had responsibility for the operation of a department.

Commissioner's analysis and findings

13. 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 her by both Mr Case and the Council. She is satisfied that no matter of relevance has been overlooked.

Regulation 5(1) of the EIRs

14. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
15. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the

case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available. In its response to Mr Case's requirement for review, and initially during the investigation, the Council maintained that all of the information was excepted from disclosure in terms of regulation 10(4)(e) of the EIRs. Latterly, the Council also sought to rely on regulation 10(5)(b) (course of justice) and 11(2)(personal information).

16. Regulation 10(4)(e), applied to all of the information withheld, will be considered in the first instance.
17. In considering the application of any exception under the EIRs, a Scottish public authority must interpret the exception in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)).

Regulation 10(4)(e) of the EIRs (internal communications)

18. Under regulation 10(4)(e) of the EIRs, a public authority may refuse to make environmental information available to the extent that it involves making available internal communications. In order for information to fall within the scope of this exception, it need only be established that the information is an internal communication. If the Commissioner decides that a document is an internal communication, she will be required to go on and consider the public interest test.
19. Taking account of the terms of this request, which sought "internal communications", and having considered the information withheld by the Council, the Commissioner is satisfied that all the withheld information comprises internal communications exchanged within the Council. Accordingly, she is satisfied that the withheld information under consideration comprises internal communications for the purposes of the EIRs and is, therefore, subject to the exception in regulation 10(4)(e).

The public interest test

20. Having accepted that the exception in regulation 10(4)(e) applies, the Commissioner is required to consider the public interest in regulation 10(1)(b) of the EIRs as a public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.
21. The Council recognised the presumption in favour of disclosure and, by extension, the public interest in securing transparency and accountability within the Council's planning process. There was, therefore, a clear public interest in disclosing how planning applications were processed and how Council Officers developed their recommendations to Committee.
22. The Council went on to argue that the public interest in disclosure was outweighed by the greater public interest in Council staff being able to have a free and frank exchange of views for the purposes of deliberation and formulation of recommendations during the planning process.
23. To support its position, the Council highlighted that the planning process was not complete at the point it received the original request for information (19 May 2014). In this case, an appeal had been made to the Scottish Ministers in relation to the decision made by the Council on the planning application. Although the Reporter had received all the information required to make a decision by the time the Council made its submission to the

Commissioner, the hearings were only begun in October 2014 (i.e. after Mr Case's application to the Commissioner).

24. The Council argued that the disclosure of its internal communications prior to the completion of this process would not be in the public interest. It argued that Council officers were required to act in the interests of all the citizens of Edinburgh and to do so they had to be able to discuss sensitive and important issues, and draft recommendations, in the knowledge that these discussions would not be placed into the public domain whilst the process was ongoing.
25. The Council noted that the Reporter had placed all of the information considered relevant to the formulation of the decision in the public domain. It was not required to disclose the information under consideration in this decision, which it believed lent weight to its argument that disclosure was not necessary as part of the planning process.
26. Mr Case argued that the public interest favoured the disclosure of information. He highlighted the requirements of regulation 10(2).
27. Mr Case explained that the Council's decision to refuse the planning application and associated modifications was contrary to the advice provided by Economic Development Service of the Council. Mr Case stated that this was pertinent because the Council's decision was, in large part, taken on economic grounds. Mr Case also argued that this advice was not properly reflected in the report to the Development Management Sub-Committee prepared by Council officials.
28. Mr Case argued that it was in the public interest to understand how the Council arrived at this decision, and how it dealt with the consultation responses and advice from its various departments and officials. In this instance he argued it was in the public interest to understand (i) how advice from Economic Development Service was formulated, (ii) how that advice was dealt with by the planning officials and (iii) how the recommendation in the report was arrived at. He did not believe the advice of the Economic Development Service to be reflected properly in the report to Committee.
29. The Commissioner has considered carefully the submissions made by both the Council and Mr Case.
30. The Commissioner recognises the significant public interest in transparency and accountability in the decision making process. The Commissioner acknowledges the public interest in understanding on how a particular decision was arrived at. There is a particularly strong public interest in ensuring that the planning process is open to public scrutiny, recognised to a large extent in the statutory framework of the process.
31. The Council's arguments in favour of maintaining the exception relate mainly to the protection of thinking space and the ability to have full and frank discussions without fear that the information will be disclosed, while the case is still live and ongoing at the time of the request.
32. In reaching her conclusion, the Commissioner notes that a substantial amount of information about these applications has been made available to the public, through the Council's own planning portal and the Reporter's website. To a significant extent, this satisfies the public interest highlighted by Mr Case. The information which remains withheld in this case reflects the Council's internal discussions, with reference to wider questions of policy as well as the merits of this specific application.

33. In the particular circumstances of this case, the Commissioner is satisfied that there is weight to the argument that some space should be afforded to the Council to have such exchanges. She must consider such questions in the circumstances prevailing at the time the Council considered the request, not the time at which she is asked to make her decision. Having considered the withheld information and all relevant submissions, the Commissioner concludes, on balance, that the public interest in making this information available is outweighed by that in maintaining the exception in regulation 10(4)(e) of the EIRs. Therefore, she considers the Council to have been justified in withholding the information under that exception.
34. As the Commissioner has concluded that the information was correctly withheld in terms of regulation 10(4)(e) of the EIRs, she is not required to consider the other exceptions applied by the Council.

Other matters

35. The Commissioner notes that the Council originally located numerous documents in handling this request, which it later acknowledged did not fall within the scope of the request. The Commissioner is concerned that these documents were only identified as such during her investigation. It would appear that the Council failed to properly analyse the information when responding to both the request and requirement for review. This failure resulted in an exaggerated impression of the volume of information held by the Council and covered by the request.
36. The Commissioner would encourage the Council (and other Scottish public authorities) to ensure that information is correctly analysed when responding to the initial request and failing that at the point of review, to ensure that it is considering only what falls within the scope of the request. Doing so should reduce the resources expended unnecessarily in handling the request and any subsequent application to the Commissioner.

Decision

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

Appeal

Should either Mr Case 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.

Rosemary Agnew
Scottish Information Commissioner

16 March 2015

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.

...

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

...

(e) the request involves making available internal communications.

...

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