

Decision Notice 044/2020

Planning Law Seminar and AMC application fees

Applicants: the Applicants

Public authority: City of Edinburgh Council

Case Ref: 201900467



Summary

The Council was asked for information relating to a Planning Law seminar and its decision to amend AMC (applications for approval of matters specified in conditions) planning fees.

The Council provided some information, but withheld other information on the basis it was internal communications and was subject to legal advice privilege.

The Commissioner investigated and found that the Council had complied with the EIRs in responding to the request.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition (a) and (c) 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 4 December 2018, with reference to a response to an earlier request, the Applicants made a request for information to the City of Edinburgh Council (the Council). The information requested was:

All documents, notes, daybooks, diary entries, minutes and emails on or after 20th April 2017 relating to (i) the “Planning Law Seminar” held on 20th April 2017; and (ii) any request for consideration of the application in respect of “[the Applicant’s] Granton Harbour Masterplan” of paragraph 5 of Schedule 1 of the 2004 Fee Regulations as updated in 2009, and which led to [], Majors Waterfront Team Manager, Planning and Transport, advising [the Applicant’s] professional advisors on 27th July 2017 that the City of Edinburgh Council had changed their interpretation and were entitled to charge full fees for any AMC applications made after Planning Permission had been obtained on a site.
2. The Council responded on 7 January 2019. It detailed the searches it had carried out for information in part (i) and provided information identified in addition to information to that provided in response to the earlier request. The Council withheld correspondence between its Planning Department and Legal Services on the basis that it was excepted under regulation 10(5)(b) and 11(2) of the EIRs.
3. On 21 January 2019, the Applicants wrote to the Council requesting a review of its decision on the basis that it had provided no documents in relation to the planning law seminar held on 20 April 2017. The Applicants did not accept that notes following on from a seminar could fall under regulation 10(5)(b) and indicated that the public interest favoured disclosure.
4. The Council notified the Applicants of the outcome of its review on 18 February 2019. It identified and provided two documents omitted from the original response falling within part

(i) of the request. It provided further explanation of information held regarding the seminar, confirmed the searches undertaken and concluded that, in its view, regulation 10(5)(b) had been properly applied to the redacted documents provided.

5. On 11 March 2019, the Applicants wrote to the Commissioner. The Applicants 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. The Applicants stated they were dissatisfied with the outcome of the Council's review because:
 - (i) no documents related to the organisation of the presentation on 20 April 2017 (or communications issued by the Council after the presentation) had been provided; and
 - (ii) they did not accept the application of regulation 10(5)(b).

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicants 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.
7. On 2 May 2019, the Council was notified in writing that the Applicants had made a valid application. The Council was asked to send the Commissioner the information withheld from the Applicants. 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 to answer specific questions. These related to the Council's reliance on regulation 10(5)(b) and the searches conducted to identify information falling within the scope of this request.
9. In the submissions provided to the Commissioner, the Council stated that it now considered that regulation 10(5)(b) had been inappropriately applied on the basis that the withheld information was confidential legal advice between the Planning Service and its legal adviser. The Council stated that it still sought to withhold the information on the basis that the exception under regulation 10(4)(e) (internal communications) applied.
10. On 5 November 2019, the Applicants were provided with an opportunity to make any further submissions due to the alteration, but no additional comments were provided.

Commissioner's analysis and findings

11. 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 the Applicants and the Council. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

12. The Commissioner is satisfied that the information covered by this request (information related to planning law and fees for planning developments) is environmental information, as defined in regulation 2(1) of the EIRs. In reaching this conclusion, the Commissioner has

considered the information in question, along with paragraphs (a) and (c) of the definition of environmental information (reproduced in Appendix 1), and he agrees with the Council in categorising the information as environmental. (The Applicants have not disputed the Council's decision to handle the request under the EIRs.)

Regulation 5(1) of the EIRs

13. 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.
14. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply.

Part (i) – the Planning Law seminar

15. In their application to the Commissioner, the Applicants were unhappy with the information provided in relation to the planning seminar on 20 April 2017. While they had been provided with a copy of a PowerPoint presentation, they considered that it was reasonable to assume that there would have been emails in respect of organising the seminar and attendees. The Applicants expected that there existed information relating to:
 - who organised the seminar in question
 - how it was organised
 - what the instructions were to named persons in respect of the subject matter of the seminar; and
 - what communications were issued by the Council following that seminar.
16. The Council stated in its submissions that the request sought information “*on or after*” 20 April 2017, the date on which the seminar was held. As such, no searches had been undertaken for information held before this date – and any information held would fall outwith the scope of the request.
17. In an attempt to address queries about the format and nature of the seminar, the Council explained that the Planning Service run a monthly Planning Practice workshop in order to provide an opportunity for the continued professional development required to be undertaken by planners as part of their membership of the Royal Town Planning Institute. Every couple of years, one of these is scheduled to be a Planning Law Update, to which Solicitors employed within the Council's Legal Service and the Council's external legal advisors contribute with an aim to provide an opportunity to update planners on recent legal developments in the planning field.
18. The Commissioner has considered the wording of original request. He accepts that the request was specific in the detail of what was sought and that the Applicants did not request information relating to the organisation and content of the seminar before 20 April 2017.
19. The Commissioner notes that the Council provided the Applicants with a copy of an internal note circulated after the seminar.
20. The standard of proof to determine whether a Scottish public authority hold information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.

21. Having considered all relevant submissions and the terms of the request, the Commissioner accepts that the Council interpreted the Applicants' request reasonably and took adequate, proportionate steps to establish what information it held which fell within the scope of the request. He accepts that the Applicants were provided with all of the information held by the Council falling within the scope of the request. Consequently, in this respect, the Commissioner is satisfied that the Council dealt with the request in accordance with regulation 5(1) of the EIRs.

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

22. Under regulation 10(4)(e) of the EIRs, a Scottish 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. However, if the Commissioner finds that a document is an internal communication, he will be required to go on to consider the public interest test in regulation 10(1)(b).
23. The Council applied this exception to five documents. The information withheld comprises of an exchange of correspondence between the Council's Planning Service and the internal legal service seeking and providing legal advice on the interpretation of Planning Regulations.
24. The Council stated that the information withheld contains internal email exchanges and does not contain factual statements, opinion or statements expressed by a public authority as a statutory consultee. The information withheld has not been shared externally with any third party.
25. Having considered the information withheld by the Council under this exception, the Commissioner is satisfied that all of this information comprises internal communications and is therefore subject to the exception in regulation 10(4)(e). He must, therefore, go on to consider whether, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

Public interest test

26. The Council recognised that there is a general presumption in favour of releasing environmental information to the public and in demonstrating how the Council fulfils its role as a Planning Authority and ensures that applicable Planning legislation is consistently and appropriately applied across Edinburgh.
27. However, the Council also argued that the interest of the wider public was greater in ensuring Council services are able to conduct internal communications during the development of services for the people of Edinburgh and in enabling the development of policies and procedures for fulfilling its statutory functions. It also stated that it was in the public interest for Council services to be able to seek confidential legal advice from the Council's internal Legal Service, ensuring all necessary legal avenues are fully examined in the delivery of Council Services.
28. The Council considers that it already ensures transparency in the planning process through publicly accessible documentation published on the website. The Council commented that it has sought to meet its obligations whilst assuring appropriate exceptions are applied where necessary.

29. The Council submitted that, while it facilitates extensive arrangements to ensure public oversight of the use of public funds through public Council and Committee meetings, publicly accessible agenda papers and reports and budgetary monitoring, it is not necessary for the public to have access to internal communications of legal advice in order to do this.
30. On balance, the Council concluded that the issues in favour of maintaining the exception outweighed those in favour of disclosure to ensure that it was able to meet its responsibilities to deliver a lawful, consistent and equitable planning system and to seek legal advice from internal legal advisers to enable it to do so.
31. The Applicants had previously stated (in relation to regulation 10(5)(b)) that disclosure of the information requested would contribute in ensuring effective oversight of the expenditure of public funds and, more particularly, would ensure fairness in relation to its applications made to the Council.
32. As noted in paragraph 10, the Applicants were offered the opportunity to comment on the application of regulation 10(4)(e) but no comments were received.

Commissioner's conclusions

33. The Commissioner has considered all of the submissions carefully, alongside the withheld information. He is satisfied that the information in question is subject to legal professional privilege: it relates to communications between a client (the Council) and its in-house solicitors. The solicitors are clearly acting in their professional capacity and the communications occurred in the context of the solicitors' professional relationship with their client.
34. The Commissioner also accepts, for the reasons provided by the Council, that the information in question remains confidential.
35. As noted in previous decisions involving both FOISA and the EIRs, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England* (2004) UKHL 48¹ and in the *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC 164 (QB)². The Commissioner will apply the same reasoning to communications attracting legal professional privilege generally. More generally, he considers there to be a strong public interest, also recognised by the courts, in the maintenance of confidences.
36. The Commissioner acknowledges that disclosure would help fulfil a public interest in transparency and accountability. He recognises that disclosure would also fulfil a strong public interest in ensuring an effective oversight of the decision-making process with respect to the processing of planning applications.
37. On the other hand, the Commissioner recognises the strong public interest in ensuring that the Council (as any Scottish public authority) can give and receive legal advice in confidence to facilitate the discharge of their functions as thoroughly and effectively as possible.

¹ <http://www.bailii.org/uk/cases/UKHL/2004/48.html>

² <http://www.bailii.org/ew/cases/EWHC/QB/2009/164.html>

38. The Commissioner considers that, on balance, and in all the circumstances of the case, the public interest arguments in favour of maintaining the exception outweigh those for making the information available – there is a greater public interest in ensuring that the Council can receive legal advice in confidence.
39. Consequently, the Commissioner is satisfied that the information was properly withheld under regulation 10(4)(e) of the EIRs.

Decision

The Commissioner finds that City of Edinburgh Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the Applicants.

Appeal

Should either the Applicants 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.

Margaret Keyse
Head of Enforcement

4 March 2020

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

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- (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.

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info