

Decision Notice 070/2020

Investigations of gas safety regulation breaches

Applicant: The Applicant

Public authority: City of Edinburgh Council

Case Ref: 201902070



Scottish Information
Commissioner

Summary

The Council was asked for the number of times it had been investigated for breaching gas safety regulations and the outcome of those investigations.

The Council responded under the EIRs that it did not hold the information requested.

The Commissioner investigated and found that the Council had partially breached the EIRs in responding to the request. The Commissioner accepted that the Council did not hold the information, but found that the Council's review was provided late and its response and review outcome were deficient in terms of advice and assistance.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) section 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b) and (c) of definition of "environmental information") (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) and (4)(a) (Exception from duty to make environmental information available); 16(3) and (4) (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 26 June 2019, the Applicant made a request for information to City of Edinburgh Council (the Council). The information he requested was the number of times the Council had been investigated for breaching gas safety regulations and the outcome of those investigations (Request 1).
2. On 1 July 2019, the Council sought clarification from the Applicant as to which gas safety regulations he was referring to in his request. The Applicant responded the same day, confirming his request referred to gas safety inspections for domestic dwelling places. On 24 July 2019, the Council responded to the request under the EIRs, as it considered the information requested to be environmental information. The response stated that there were no records of any external investigations having taken place into breaches of gas safety regulations.
3. Later the same day, the Applicant wrote to the Council, indicating that he had knowledge of one such investigation being conducted by the Health and Safety Executive (HSE) and questioning why this had not shown up during the searches conducted by the Council. The Council considered this to be a request for review.
4. On 2 September 2019, the Council notified the Applicant of the outcome of its review. It upheld its original decision. The Council acknowledged the incident the Applicant referred to,

but stated that it was not recorded as an investigation into a breach of gas safety regulations and so was not covered by the initial request.

5. On 2 September 2019, the Applicant responded to the Council's review, questioning its assertion that there was no investigation of a breach of gas safety regulations and asking about how this type of information was recorded by the Council. The Council treated this as a new request for information ("Request 2").
6. On 7 October 2019, the Council provided the Applicant with a response to "Request 2". The Council stated that regulation 10(4)(a) of the EIRs applied to this request as the information was not held by the Council. The Council provided him with information on how it managed any domestic gas incidents that would be reportable to HSE.
7. On 10 October 2019, the Applicant asked the Council if there was a policy or procedure in place for dealing with reports of gas safety regulations and asked for a web link to any such information. He again questioned the Council's response to his initial request of 26 June 2019, referring to written advice he had received from HSE.
8. On 7 November 2019, the Council provided the Applicant with a review of its response to "Request 2". It confirmed there were no written policies or procedures that were specific to gas safety. It provided him with information about gas safety situations that required to be immediately reported to HSE. The Council informed the Applicant that two such incidents from 2018 had been identified. It acknowledged that its previous searches had not been thorough enough and had resulted in the Applicant being provided with inaccurate information, for which it apologised.
9. On 11 November 2019, the Applicant wrote to the Commissioner. The Applicant 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. The Applicant stated he was dissatisfied with the outcome of the Council's review because he did not believe his information request had been fully answered.

Investigation

10. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to those requests before applying to him for a decision.
11. On 25 November 2019, the Council was notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.
12. 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 interpretation of the Applicant's request, the searches carried out to determine what information was held, and the advice and assistance provided to the Applicant.
13. During the investigation, the Council offered to meet with the Applicant to assist him to understand how the Council managed and recorded this type of information. The Applicant did not wish to take up this offer, but preferred instead to receive a written response from the Council.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

15. It is clear from the Council's correspondence with the Applicant and the Commissioner that any information falling within the scope of this request would be environmental information, as defined in regulation 2(1) of the EIRs. The Applicant has asked for information pertaining to domestic gas safety in Council-owned premises. Any information held would relate to factors referred to in paragraph (b) of the definition in regulation 2(1) of the EIRs, such as substances or energy, affecting or likely to affect the elements of the environment referred to in paragraph (a) of the definition, or to measures and activities affecting those factors. As such, the Commissioner is satisfied that the Applicant's request would fall within paragraphs (a), (b) and (c) of the definition of environmental information.
16. The Applicant made no comment on the Council's application of the EIRs in this case and the Commissioner will consider the requests in what follows solely in terms of the EIRs.

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

17. 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. 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 an applicant believes the authority should hold.
18. 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 provide that information to the applicant, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)). If no such information is held by the authority, regulation 10(4)(a) of the EIRs permits the authority to give an applicant notice to that effect.

Interpretation of Request 1

19. The Council interpreted the Applicant's request for occasions when it had been "*investigated for breaching gas safety*" as covering the formal investigative processes that HSE can initiate.
20. The Council made a distinction between this independent investigation process and the self-reporting mechanism where the Council engages with HSE to support general gas safety matters.
21. The Applicant argued that the Council must hold the information requested because he had first-hand knowledge of a breach of gas safety regulations that HSE had looked into. The Applicant explained that this involved him alerting HSE to a domestic property belonging to the Council for which a gas safety certificate had not been provided, as required by legislation.
22. The Applicant explained that he had received confirmation from HSE that as the Council had not been able to produce a Landlord's Gas Safety Certificate for the premises concerned, it was in breach of the Gas Safety (Installation and Use) Regulations 1998. (HSE was,

however, satisfied that this was a genuine oversight on the part of the Council, and no further action was taken by HSE.)

23. The Applicant considered that, as this incident involved a breach of gas safety regulations, it – and any other incidents like it – should have been reflected in the Council’s response to his request for information.
24. The Commissioner accepts that the interpretation of the request is where the Applicant and the Council differ. This difference in view has resulted in the Applicant’s belief that the Council’s response was incorrect in terms of the EIRs and that the Council was wrong to state that it held no information.
25. The Commissioner can understand the Applicant’s position with regard to a situation where gas safety legislation was breached by the Council. However, he also recognises the Council’s argument is that it has not recorded the incident as such. The Commissioner has looked at the Council’s interpretation of the request and cannot say that it was unreasonable in the circumstances.
26. As explained previously, the Commissioner can only consider information held by the Council. He cannot consider what information it should hold, or what the Applicant might believe it should hold.

Searches

27. The Council described the searches carried out, which included contacting its Housing Property, Corporate Property, Corporate Health and Safety, and Legal Services to ascertain what information was held (bearing in mind the Council’s interpretation of the request).
 - Corporate Property and Legal Services confirmed they would not be involved in matters relating to domestic gas safety
 - The Team Leader, Housing Property Services and the Corporate Health and Safety Manager advised they had no recorded information because they were not aware of the Council being formally investigated for being in breach of gas safety regulations. Both of these services confirmed that to be investigated by HSE, as they understood it, would be a significant occurrence and would be something the appropriate officer would be aware of immediately
 - The Council considered, therefore, that due to the significance of an investigation by HSE, no further searches were necessary: it would have been immediately possible to identify any information held.
28. The Commissioner is satisfied that these steps were reasonable and proportionate in the circumstances. Given that the Commissioner accepts the Council’s interpretation of the request was not unreasonable, he is satisfied that the Council was entitled to conclude that it did not hold information falling within the scope of Request 1 and was entitled to refuse this request under regulation 10(4)(a) of the EIRs.
29. In coming to this conclusion, the Commissioner accepts that the Council’s searches appear to have been capable of identifying any information held which fell within the scope of the Applicant’s request. The Council staff involved in searching for the information had experience and knowledge of the subject matter of the request and, accordingly, there was less scope for error and misunderstanding in locating the information requested. Also, the Commissioner accepts the Council’s point that being investigated by HSE would be a significant occurrence and would be something that the Council staff consulted would be

aware of, and therefore be aware of any recorded information held by the Council and where that information would be located.

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. In this case, for the reasons set out above, the Commissioner is satisfied that the Council 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.

Duty to provide advice and assistance

31. Regulation 9(1) of the EIRs provides that a Scottish public authority must, so far as it would be reasonable to expect it to do so, provide advice and assistance to applicants and potential applicants. Regulation 9(3) provides that a Scottish public authority shall be taken to have complied with this duty if it conforms with the relevant Code of Practice (in relation to the provision of advice and assistance).
32. The Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs (the Section 60 Code ¹) states (at paragraph 5.1 in Part 2):

Authorities should offer advice and assistance at all stages of a request

Authorities have a duty to provide advice and assistance at all stages of a request. It can be given either before a request is made, or to clarify what information an applicant wants after a request has been made, whilst the authority is handling the request, or after it has responded.

33. The Commissioner notes that the Applicant's email of 24 July 2019 (first request for review) highlights his awareness of an incident he considered to be a breach of gas safety legislation and the fact that he had been in contact with HSE to confirm this.
34. The Council acknowledged that in this first review it did not explain what it would consider to be an investigative breach of gas safety. It accepted that it would have been helpful to communicate more directly with the Applicant in order to advise and assist, and thus understand more clearly what he was looking for. The Council apologised that this did not happen.
35. The Commissioner notes that the matters raised by the Applicant following the Council's review response (to Request 1) do not constitute a request for recorded information. The Council has acknowledged that the Applicant was seeking clarification and context to help him understand his response, and that advice and assistance should have been provided to him rather than logging this as a new information request (i.e. "Request 2").
36. The Council acknowledged that it was inevitable that the response to "Request 2" would be that no information was held as the request was not for recorded information.

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

37. The Council considered the review that followed tried to offer advice and assistance, but it recognised that this was not sufficient. The Council apologised to the Applicant for failing to fully clarify the scope of his request.

The Commissioner's view

38. It ought to have been clear to the Council at the first review stage that it and the Applicant were not thinking along the same lines. This should have prompted the Council to discuss the request with the Applicant and offer him advice and assistance. This might have resulted in a request more appropriately framed for the Council's approach to recording such matters and might have avoided the need for the Applicant to make an application to the Commissioner.
39. The Commissioner considers it would have been reasonable for the Council to recognise the Applicant's desire to understand the responses he had been given at the first review, in response to what the Council deemed Request 2 and at the second review. At each of these stages, the Commissioner is of the view that the Council should have recognised the need to offer the Applicant advice and assistance.
40. The Commissioner therefore finds that, in the respects considered above, the Council failed to comply with its duty to provide reasonable advice and assistance under Regulation 9(1) of the EIRs.

Handling of request(s)

41. 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)).
42. The Commissioner notes that, although the Council did respond to the Applicant's requirement for review (Request 1), this response was not within the required timeframe. The Commissioner must therefore find that, in failing to respond to the requirement for review within the time allowed, the Council failed to meet the requirements of section 16(4) of the EIRs.

Decision

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

The Commissioner finds that, in concluding that no information was held, the Council complied with the EIRs.

However, the Council failed in its duty to provide advice and assistance to the Applicant in handling of his information request and, in that respect, failed to comply with regulation 9(1) of the EIRs.

The Commissioner also finds that the Council did not respond to the requirement for review within the prescribed timescale, and in that respect failed to comply with regulation 16(4) of the EIRs.

Given that the Council has offered the Applicant advice and assistance should he wish to make a new request for information, the Commissioner does not require the Council to take any action in respect of these failures, in response to the Applicant's application.

Appeal

Should either the Applicant 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

12 June 2020

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

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;
- (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 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;

...

- (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;

...

16 Review by Scottish public authority

...

- (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.

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info