

Decision Notice 105/2021

Granton Harbour Estate – Compulsory Purchase Order

Applicant: The Applicant

Public authority: City of Edinburgh Council

Case Ref: 202001335



Scottish Information
Commissioner

Summary

The Council was asked for information on discussions held between specified parties regarding the Council proposing to purchase the Granton Harbour Estate by means of a Compulsory Purchase Order.

The Council considered the request under the EIRs and stated it did not hold any information falling within the scope of the request.

Following an investigation, the Commissioner was not satisfied that adequate searches had been carried out for the information. He required the Council to carry out further searches.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (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”) (Interpretation); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (4)(a) (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 3 June 2020, the Applicant made a request for information to City of Edinburgh Council (the Council). The information requested was:

All documents, notes, notes of discussions, diary entries, minutes and email whether held electronically or otherwise in respect of any discussions between or among, Paul Lawrence and any City of Edinburgh Council Councillors or officers, or any third parties, and without prejudice to that generality between Paul Lawrence and all or any of Cllr Cammy Day, Cllr Neil Gardiner, Andrew Kerr, David Cooper and David Givan, in March 2019 and immediately prior and thereafter up until May 31st 2020 in respect of City of Edinburgh Council proposing to purchase the Granton Harbour Estate, West Harbour Road, Edinburgh by means of a Compulsory Purchase Order (CPO). Failing principals, copies thereof.

2. The Council responded on 2 July 2020, having considered the request under the EIRs and applying section 39(2) of FOISA. It informed the Applicant, in terms of regulation 10(4)(a), that it did not hold the information requested.
3. On 8 July 2020, the Applicant wrote to the Council requesting a review of its decision on the basis that:
 - (i) The request asked the Council to disclose “all documents, notes, notes of discussions, diary entries, minutes and email” but the Council’s response stated it held no such “documentation”. The Applicant asked the Council to clarify that this included all the categories listed and to confirm that this was correct.

- (ii) It was aware there had been such discussions regarding the subject matter and therefore considered the Council had failed to comply with the request and provide any relevant information.
- 4. The Council notified the Applicant of the outcome of its review on 6 August 2020, fully upholding its original decision. It explained that, under the EIRs, while applicants have the right to access any recorded information held (unless an exception applies), the Council is not required to create information to satisfy a request where such information is not already held, or to provide information no longer held. It confirmed that appropriate searches had been carried out of councillor and officer email accounts, electronic records, diaries and notebooks, and that no information falling within the scope of the request had been identified. The Council noted the Applicant was aware of discussions having taken place and asked it to confirm the date, venue and attendees to enable focused searches to be carried out.
- 5. On 6 November 2020, the Applicant wrote to the Commissioner, applying 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 it was dissatisfied with the outcome of the Council's review for the following reasons:
 - (i) It believed the Council had failed to properly address the issues raised in the requirement for review.
 - (ii) It provided details of discussions held in March 2019 involving senior Council staff (including dates, location and parties present) regarding the Edinburgh Waterfront and the Granton Harbour Estate, during which the CPO procedure was mentioned. It commented that it did not appear credible this possibility was not discussed and communicated internally within the Council, in any recoverable form.
 - (iii) As the property formed part of the larger Granton Waterfront Development Framework document issued by the Council, it did not believe it credible that no documents existed dealing with the possibility of the Council exercising compulsory purchase powers in respect of that property.
 - (iv) Disclosure of the information was very much in the public interest, as it related directly to the interaction of the Council with private property and commercial interests.

Investigation

- 6. 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 that request before applying to him for a decision.
- 7. On 11 December 2020, the Council was notified in writing that the Applicant had made a valid application and the case was subsequently 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 focused on the searches carried out by the Council which led it to conclude that it held no information falling within the scope of the request.
- 9. The Applicant was also asked to provide further clarification of the identities of the parties mentioned in the discussions detailed in its application.

10. Both parties provided responses to the Commissioner.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of 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.

Handling in terms of the EIRs

12. The Council considered the Applicant's request under the EIRs, having concluded that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
13. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
14. The Council submitted that the information requested by the Applicant was environmental as it concerned administrative measures relating to the land, in this case a CPO for the land at Granton Harbour Estate.
15. The Commissioner accepts this as a reasonable description and, in the circumstances, is satisfied that the information requested by the Applicant falls within the definition of environmental information set out in regulation 2(1), in particular paragraphs (a) and (c) of that definition.

Section 39(2) of FOISA – Environmental information

16. 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 Commissioner accepts that the Council was entitled to apply this exemption to the information withheld under FOISA, given his conclusion that it is properly classified as environmental information.
17. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA. Both regimes are intended to promote public access to information and there would appear to be no reason why (in this particular case) disclosure of the information should be more likely under FOISA than under the EIRs.
18. The Commissioner therefore concludes that the Council was correct to apply section 39(2) of FOISA and consider the Applicant's information request under the EIRs.

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

19. 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. This obligation relates to information that is held by the authority when it receives a request.

20. 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 which an applicant believes the authority should hold.
21. 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 requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
22. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.

Whether the Council held any information falling within the scope of the request

23. In its initial response, upheld at review, the Council maintained that it held no information falling within the scope of the request and applied regulation 10(4)(a) of the EIRs. Regulation 10(4)(a) states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when the applicant's request is received.
24. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.
25. The Commissioner has taken account of the arguments in the Applicant's requirement for review and in its application, in which it provides reasons why it considers the Council holds the information requested.
26. In this case, therefore, the Commissioner must be satisfied that the Council took adequate steps to allow it to conclude that it held no information relevant to the request.
27. The Commissioner notes that, in its review outcome, the Council claimed that appropriate searches had been carried out of councillor and officer email accounts, electronic records, diaries and notebooks. To support its position that no relevant information had been identified, the Council was asked to describe the searches it had carried out and to provide any supporting evidence of these.

The Council's initial submissions on searches

28. In its initial submissions to the Commissioner, the Council maintained that extensive searches were undertaken in the named officers' and councillors' records - including email accounts, electronic and hard copy records (including diaries and notebooks). It described these searches:
 - Senior Executive Assistants within the Place Directorate and Chief Executive's Office had undertaken searches of the email accounts, electronic and hard copy records held by each of the named officers.

- Further checks were made with each officer to ascertain whether they held any notes, or other information arising from discussions covered by the request.
 - The search keywords used were “Granton”, “Granton Harbour Estate”, “GCDL”, “Compulsory Purchase Order” and “CPO”.
 - Searches, on this same basis, were undertaken by Elected Members Officers on behalf of each of the councillors named in the request.
29. The Council stated that the reference to specific discussions detailed in the Applicant’s application to the Commissioner was the first time these had been referenced by the Applicant. The Council submitted that further searches had been undertaken by the Place Directorate Senior Executive Assistant, particularly of the papers and notes held by each of the officers who had attended the MIPIM property conference in March 2019. While the Council agreed that these discussions had taken place, it confirmed that no corresponding recorded information had been identified.
30. The Council submitted that, as the above searches identified no relevant information, it was therefore satisfied that it held no information captured by the request.
31. In response to the Applicant’s assertion that the Council had not answered the additional points raised in the requirement for review, the Council submitted that it had addressed these by listing the types of records that had been searched, and by suggesting that the Applicant share with the Council the details of the meetings/discussions it was aware of, to ensure focused searches could be undertaken.

The Council’s subsequent submissions on searches

32. Noting that the submissions provided by the Council appeared to provide only an overview of the searches undertaken, the Investigating Officer asked the Council to provide further details of the specific searches conducted and the individuals involved in these, together with any supporting evidence, in order that the Commissioner could be satisfied that full and thorough searches had been carried out.
33. In response, the Council explained that the request had been passed to Legal Services due to its subject matter, and the search for information had been co-ordinated by a Trainee Solicitor.
34. The Council explained and provided supporting evidence of these searches:
- The Council listed those who were asked to undertake searches, namely the Property and Planning Team in Legal Services, five of the six individuals named in the request and two other officers (whose job titles were identified in later submissions).
 - Copies of the emails requesting these searches, and the responses received, were provided in evidence. These confirmed a nil response from five of the individuals approached.
35. The Council submitted that these searches confirmed that, in the most part, no information was held. It explained that one document had been identified, but discussions surrounding this had determined that it did not fall within the scope of the request.

The Council’s final submissions on searches

36. Following consideration of the further information and supporting evidence now provided by the Council, the Investigating Officer compared this with the Council’s original submissions. This identified that the two sets of submissions did not tie together, and there appeared to be

gaps in the searches carried out and the supporting evidence provided. The Council was asked to provide further specific submissions on a number of aspects.

37. In response, the Council acknowledged and apologised that the information provided to the Commissioner was inconsistent and confusing. It explained that the officer who had dealt with the review had left the Council early in the Commissioner's investigation. As a result, it had been difficult to reconcile the sequence of events without that officer's input and comments, and so it was unable to provide some of the further specific information now sought on the searches carried out.

Scope of request

38. The Council was asked to confirm its understanding of the scope of the request.
39. In response, the Council confirmed that it understood the request captured information on discussions involving Paul Lawrence and any councillors, officers or third parties (including the five other individuals named in the request), from immediately prior to March 2019 up to 31 May 2020, concerning the Council proposing to purchase the Granton Harbour Estate by means of a CPO. The common factor was information on such discussions involving Paul Lawrence.
40. The Council was asked to further explain its earlier submissions and provide any additional supporting evidence, in order to allow the Commissioner to reach an informed conclusion on whether the Council held any information falling within the scope of this request. It was asked to explain who was involved in the searches and why they were considered relevant, which records had been searched and how. It was suggested that the Council may wish to consider carrying out full searches again to capture any areas, not previously searched, where information might be held.

Council's further comments on original submissions on searches

41. The Council explained that Paul Lawrence's email account was managed by colleagues in the Directorate team, i.e. the Senior Executive Officer and the Executive Management Support Officer, who managed senior officers' email inboxes and folders, and carried out searches in response to information requests. It submitted that Paul Lawrence had no recollection of having had any such discussions, as evidenced in his email response to the request for searches, previously provided to the Commissioner. In support of this position, the Council also provided an email from Mr Lawrence's Executive Assistant confirming a search of his email account had identified no information. The Council explained that, as Executive Director of Place, Paul Lawrence had oversight of all matters pertaining to Council land and, given discussions involving him were the main focus of the request, the Council believed this provided fairly definitive confirmation that no information was held.
42. The Council confirmed, however, that it now appeared that only emails had been searched and it was unable to confirm what other electronic and hard copy files were referred to in its review outcome. It submitted that, from its interpretation of the request, it had determined that any information held would be in the format of an email or a meeting which would be identifiable as a result of searching Paul Lawrence's email account and diary, and therefore no wider searches were deemed necessary. The Council was unable to provide any further information on the "checks" referred to in its initial submissions.
43. The Council explained that, for completeness, the other officers named in the request, plus some others considered relevant to the subject matter, were included in the search. It confirmed, however, that it did not hold any further information in respect of searches

undertaken by Elected Members Officers (as described in its initial submissions), other than a response from Councillor Gardiner (which was provided with its subsequent submissions).

44. From the Council's records, while it was clear that Councillors Day and Gardiner had been asked to carry out searches, with Councillor Gardiner providing a "nil" response, the Council confirmed it did not hold any further information on any other officers who had carried out searches on behalf of the councillors named in the request.

Council's further comments on subsequent submissions on searches

45. The Council submitted that the individuals and teams listed in its subsequent submissions had been furnished with the text of the request and had carried out searches using the search terms "Granton Harbour Estate" and "compulsory purchase order". Those that responded checked their email and diaries.
46. The Council explained that the Investments Senior Manager and Senior Construction Project Manager were included in the searches as it was considered they could potentially hold relevant information, due to their roles in Council investments and construction projects.
47. For the searches carried out in the Property and Planning Team in Legal Services, the Council explained that the Solicitor had responded advising that no relevant information was held by the Council's Legal Team. While the Council confirmed it held no record of the searches undertaken, it was determined that the knowledge and expertise of the officers involved provided sufficient assurance that this was an accurate response. The Council also submitted that the Principal and Senior Solicitors for Real Estate and Planning had advised the Trainee Solicitor on the searches for information.
48. For the individuals who had not responded to the request for searches (namely Councillor Day and the Investments Senior Manager), the Council did not chase up a response from the Investments Senior Manager due to Paul Lawrence having confirmed he held no information (as outlined above). Councillor Day was chased for a response but did not reply, and this was not pursued for the same reason.
49. As no searches appeared to have been requested of Andrew Kerr (who was named in the request), the Council was asked to ensure relevant searches had been carried out and evidence of these provided. In response, the Council confirmed that a search of Mr Kerr's email and diary had now been carried out using the search terms "Granton Harbour Estate" and "compulsory purchase order", but no information had been identified.
50. In terms of the Council's approach to searching for any relevant information, it explained that Paul Lawrence, who was the primary focus of the request, had been asked to provide any relevant information, and he advised that he had no recollection of any such discussions, which was supported by searches of his email and calendar. The Council determined it was reasonable to approach the search in this way, given that he was the main focus and there were a number of councillors, many of whom would have no involvement in such matters.

Document identified

51. The Council was asked to provide evidence in support of its determination that the document identified in the searches did not fall within the scope of the request.
52. In response, the Council stated it had been unable to confirm who had created this document, when it had been created, whether it was a draft or a final document, and whether it had been shared or discussed with Paul Lawrence. In these circumstances, the Council

submitted, it felt this information could not be considered as falling within the scope of the request.

The Commissioner's views

53. In considering this case, the Commissioner has taken into account the wording of the request and the potential scope for searches that such wording would involve. He acknowledges that a request covering discussions between Paul Lawrence and "all councillors, officers and third parties" (including five named individuals) could be interpreted to be wide ranging. However, given the common factor in these discussions was Paul Lawrence, the Commissioner considers a reasonable interpretation of the request would be to focus the scope of searches to cover information on discussions involving Mr Lawrence and extending to the five named individuals.
54. Notwithstanding this view, it is clear, from the Council's submissions on searches, that these, as they stand, are not sufficient to allow the Commissioner to conclude, either way, whether the Council holds any information falling within scope. He is concerned to note that it was necessary to ask the Council, on three separate occasions during the investigation, to provide submissions on searches, submissions which still do not knit together cohesively and which have clearly identified gaps in the searches carried out by the Council.
55. While the Commissioner notes the challenges posed due to a change of Council staff during his investigation, he would stress the importance of full and adequate searches of all appropriate locations, and the ability to be able to supply evidence of such searches when providing submissions during any investigation carried out by his office. Conducting thorough and focused searches, and retaining records of searches carried out and decisions taken, can save a lot of time and work in the longer run, and may even avoid an unnecessary application being made to the Commissioner.
56. The Commissioner has also considered the Council's review outcome and can see no failure to address the additional points raised therein.
57. The Commissioner has examined the emails provided in evidence of the Council's searches, together with the document identified as a result of these. He notes that these emails evidence that a number of questions were raised, and views provided, on whether the information in the document (either in whole or in part) could be deemed to fall within the scope of the request. He is also concerned to note that these discussions appear to show, however, that no conclusion was actually reached on this point.
58. The Commissioner is not satisfied that the Council's submissions regarding whether or not the document identified falls within the scope of the request are conclusive, despite the Council's apparent determination that it did not fall within scope. He requires the Council to undertake further enquiries to identify when this document was created and by whom, and whether it was shared with or discussed by Paul Lawrence, in order to establish whether any of the information contained therein, either in whole or in part, falls within the scope of the request.
59. In all the circumstances, therefore, the Commissioner is not satisfied that the Council took adequate steps to identify and locate the information requested by the Applicant. He is unable to conclude otherwise, on the evidence and explanations provided by the Council.
60. The Commissioner finds that the Council failed to deal with the Applicant's request in accordance with regulation 5(1) of the EIRs, and now requires the Council to carry out full searches, to determine whether any relevant information is held. He also requires the

Council to reach a conclusion on whether any of the information contained within the document identified during the searches carried out falls within scope.

61. The Commissioner therefore requires the Council to provide the Applicant with a revised review outcome, disclosing any information identified as falling within scope (either as a result of these searches and/or contained within the document already identified), or explaining why (in accordance with any relevant provision in the EIRs) the information cannot be disclosed.

Decision

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

He finds that, in failing to take adequate steps to identify, locate and provide any information falling within the scope of the request, the Council failed to comply with regulation 5(1) of the EIRs.

The Commissioner therefore requires the Council to undertake full searches to determine whether any relevant information is held, and to reach a conclusion on whether any information held in the document already identified falls within the scope of the request.

He requires the Council to provide the Applicant with a revised review outcome, disclosing any information identified as falling within scope (either as a result of these searches and/or contained within the document already identified), or explaining why (in accordance with any relevant provision in the EIRs) the information cannot be disclosed, by **17 August 2021**.

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.

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

30 June 2021

Appendix 1: Relevant statutory provisions

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.

...

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

- (a) it does not hold that information when an applicant's request is received;

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info