

Decision Notice

Decision 118/2014: Mr X and Dunbritton Housing Association Ltd

Transfer of the Brown Street Complex, Haldane by West Dunbartonshire Council: failure to respond to request for review

Reference No: 201302209

Decision Date: 2 June 2014



Scottish Information
Commissioner

Summary

On 21 July 2013, Mr X asked Dunbritton Housing Association Ltd (Dunbritton) for information relating to the transfer of shops and flats in Brown Street, Haldane by West Dunbartonshire Council. Dunbritton informed Mr X that it was not covered by the EIRs and failed to respond to his subsequent requirement for review.

Following an investigation, the Commissioner was satisfied that Dunbritton was a Scottish public authority for the purposes of the EIRs and that some of the withheld information comprised environmental information. She found that Dunbritton had failed to comply with the EIRs by informing Mr X that it was not covered by the EIRs and by failing to carry out a review.

The Commissioner required Dunbritton to carry out a review and to notify Mr X of the outcome in line with regulation 16 of the EIRs.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations:

2(1) (Interpretation) (definition of “the Act”), (definitions (a), (b), (c), (e) and (f) of “environmental information”), (definitions of “Scottish public authority”);

5(1) and (2) (Duty to make environmental information available on request);

16 (Review by Scottish public authority)

The full text of the statutory provisions in the EIRs cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

The following statutory provisions were also taken into account in this decision, these are not set out in full, but are summarised in Appendix 2 to this decision.

Both Appendices form part of this decision:

Housing (Scotland) Act 2010 (the 2010 Act) sections:

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| 1 (The Scottish Housing Regulator); | 57 (Appointment of manager for housing activities); |
| 2 (The Regulator’s objective); | 58 (Appointment of manager for financial or other affairs); |
| 3 (The Regulator’s functions); | 59 (Appointment of manager: supplementary); |
| 34 (Performance improvement targets); | 60 (General power to remove officers); |
| 37 (Financial management or governance targets for registered social landlords); | 61 (Suspension of officers etc. during or following inquiries); |
| 42 (Inquiries about social landlords); | 65 (Appointment of new officers); |
| 43 (Inquiries: general powers); | 66 (Restrictions on dealings during or following inquiries); |
| 44 (Inquiries: survey powers); | 67 (Transfer of assets following inquiries); |
| 45 (Exceptional audit); | 93 (Change of constitution) |
| 52 (Regulatory intervention); | |
| 55 (Performance improvement plans); | |
| 56 (Enforcement notices); | |

Background

1. On 21 July 2013, Mr X wrote to Dunbritton asking for all information held in connection with the transfer of the Brown Street parade of shops and flats in Haldane by West Dunbartonshire Council at nil value. Mr X stated that he was making his request under the EIRs. He gave examples of the type of information he wanted.
2. Dunbritton responded on 31 July 2013. It informed Mr X that the EIRs did not apply to it and that it would not be responding to his request.
3. On 2 August 2013, Mr X wrote to Dunbritton requesting a review of its decision (in line with regulation 16 of the EIRs). Mr X disagreed that the EIRs did not apply to Dunbritton.
4. Dunbritton did not respond to Mr X's request for review.
5. On 18 September 2013, Mr X wrote to the Commissioner, stating that he was dissatisfied with the lack of review and applying 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.

Investigation

6. The case was allocated to an investigating officer. On 6 November 2013, Dunbritton was notified in writing that an application had been received from Mr X and was asked to provide the Commissioner with any information withheld from him. The investigating officer explained that the Commissioner had come to the view that Dunbritton might fall within the definition of Scottish public authority under the EIRs. Before coming to a final view, the Commissioner wished to determine whether any of the information Dunbritton held was environmental information for the purposes of regulation 2(1) of the EIRs.
7. Dunbritton responded on 11 November 2013. Dunbritton stated that it had taken legal advice from its solicitors and did not consider that the EIRs applied to it.
8. An information notice was issued by the Commissioner under section 50(1)(a) of FOISA on 4 December 2013. The Commissioner informed Dunbritton that, in her view, it fell within the definition of a Scottish public authority for the purposes of the EIRs. The information notice required Dunbritton to provide the Commissioner with any information falling within the scope of Mr X's request which had been withheld from him.
9. Dunbritton provided the requested information on 17 February 2014.
10. Having reviewed the information provided by Dunbritton, the Commissioner concluded that at least some of it comprised environmental information as defined in the EIRs.
11. The investigating officer subsequently contacted Dunbritton, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). The investigating officer also provided Dunbritton with a schedule of documents indicating the information that was considered to be environmental information.
12. Dunbritton did not provide any submissions contradicting the Commissioner's view that it was a Scottish public authority for the purposes of the EIRs.

13. During the investigation, Mr X provided submissions to the Commissioner explaining why he considered Dunbritton to be a Scottish public authority for the purposes of the EIRs.

Commissioner's analysis and findings

14. 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 X and Dunbritton. She is satisfied that no matter of relevance has been overlooked.

Is the information under consideration "environmental"?

15. Environmental information is defined in regulation 2(1) of the EIRs (the relevant parts of the definition are reproduced in the Appendix to this decision). Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
16. The Commissioner is satisfied that the information under consideration comprises environmental information as defined in regulation 2(1) of the EIRs.
17. The relevant information concerns matters relating to a proposed planning development and regeneration project. The Commissioner is satisfied that it would fall within either paragraphs (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), (b) (as information on factors affecting or likely to affect those elements), (c) (as information on measures affecting or likely to affect those elements and factors) or (e) (as information on cost benefits or other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c)).
18. Having concluded that the information under consideration is environmental information for the purposes of the EIRs, the Commissioner will now go on to consider whether Dunbritton is a Scottish public authority for the purposes of the EIRs.

Is Dunbritton a Scottish public authority as defined in the EIRs?

19. Regulation 2(1) (definition of Scottish public authority) of the EIRs provides that "Scottish public authority" means -
 - (a) any body which, any other person who, or the holder of any office which is-
 - (i) listed in schedule 1 to [FOISA] (but subject to any qualification in that schedule), or
 - (ii) designated by order under section 5(1) of [FOISA];
 - (b) a publicly-owned company as defined by section 6 of [FOISA];
 - (c) any other Scottish public authority with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998); and
 - (d) any other person who is neither a public body nor the holder of a public office and who is under the control of a person or body falling within paragraphs (a), (b) or (c) of this definition and-
 - (i) has public responsibilities relating to the environment;
 - (ii) exercises functions of a public nature relating to the environment; or

(iii) provides public services relating to the environment.

20. The Commissioner has considered whether or not Dunbritton falls within any of the categories of Scottish public authority listed in paragraphs (a) to (d) above. Having done so, she is satisfied that the only possible category into which Dunbritton could fall is definition (d).

Is Dunbritton “under the control of” a person or body falling within definitions (a) to (c)?

21. The Commissioner has considered firstly whether Dunbritton is under the control of a person or body falling within paragraphs (a), (b) or (c) of the definition in regulation 2(1). “Control” can be defined in several ways, however the legal definition the Commissioner has considered is “the power to direct, manage, oversee and/or restrict the affairs, business or assets of a person or entity”¹.
22. The body which registers and regulates Registered Social Landlords (RSLs) such as Dunbritton in Scotland is the Scottish Housing Regulator (SHR). SHR is listed as a Scottish public authority in Schedule 1, Part 7 of FOISA (paragraph 85B). Dunbritton is registered as a RSL with SHR.
23. SHR was established under section 1 of the 2010 Act. Its statutory objective, defined in section 2(1) of the 2010 Act is: “to safeguard and promote the interests of persons who are or who may become –
- (a) homeless,
 - (b) tenants of social landlords, or
 - (c) recipients of housing services provided by social landlords”.
24. The Scottish Government’s Explanatory Notes to the Bill for the 2010 Act state that Part 1 of the 2010 Act establishes SHR as an independent regulator with the objective of safeguarding and promoting the interests of tenants, prospective tenants, homeless people and others using housing services provided by social landlords.
25. The Scottish Government’s Policy Memorandum to the Bill for the 2010 Act² states that:
- “Regulation of social housing exists to ensure that social landlords meet their obligations to their tenants and to help compensate tenants for the lack of choice that they have as a result of demand for social housing exceeding the available supply. It also provides reassurance that the substantial amounts of current and historic public investment in social housing are being used to deliver services for tenants of broadly comparable value across the country.
- “In bringing forward provisions to modernise regulation, the Scottish Government has two aims: to place current and future tenants, homeless people and other service users at the heart of the new regime; and, consistent with its wider approach to scrutiny reform, to create a proportionate and risk based regime that encourages and supports social landlords to improve their performance.
- “To achieve these aims, the Bill provides for the creation of the SHR as a body corporate that is independent of Ministers. The SHR will have a range of functions in relation to the regulation of social landlords, many of which are based on functions that the Scottish

¹ <http://legal-dictionary.thefreedictionary.com/control>. NB - this was the definition used by the Information Commissioner in Wesley Housing Association Ltd FER149772:

http://ico.org.uk/~media/documents/decisionnotices/2008/fer_149772.ashx.

² [http://www.scottish.parliament.uk/S3_Bills/Housing%20\(Scotland\)%20Bill/b36s3-introd-pm.pdf](http://www.scottish.parliament.uk/S3_Bills/Housing%20(Scotland)%20Bill/b36s3-introd-pm.pdf)

Ministers exercise at present in respect of safeguarding the good governance, financial wellbeing and assets of RSLs. It will have a clear statutory remit to safeguard and promote the interests of current and future tenants, homeless people and other service users and will be able to do so on the basis of a proportionate and risk based approach.”

26. Section 3(1) of the 2010 Act describes SHR’s functions. These include monitoring, assessing and reporting regularly on (and, where appropriate, making regulatory interventions relating to) RSLs’ performance of housing activities, financial well-being and standards of governance.
27. Appendix 2 to this decision sets out a summary of the other relevant parts of the 2010 Act, highlighting the nature of the relationship between the SHR and RSLs.
28. The Commissioner notes that Dunbritton is an independent voluntary organisation. However, the Commissioner is not satisfied that this in itself means that Dunbritton is not “under the control of” SHR.
29. The Commissioner considers the definition of “control” to be as stated earlier in this decision, i.e. “the power to direct, manage, oversee and/or restrict the affairs, business or assets of a person or entity”. Dunbritton (along with other RSLs) is clearly subject to considerable regulation by SHR. This is evidenced by SHR’s extensive powers of intervention in situations of alleged misconduct, mismanagement or underperformance and its powers to require remedial action as summarised in Appendix 2.
30. The Commissioner is satisfied that Dunbritton is “under the control of” SHR on the basis that SHR can oversee and direct Dunbritton’s affairs by virtue of its extensive powers of regulation and intervention. The Commissioner has therefore concluded that Dunbritton is under the control of a body falling within definition (a)(i) of Scottish public authority in regulation 2(1) of the EIRs.
31. Having reached this conclusion, the Commissioner has gone on to consider whether Dunbritton has any of the public responsibilities, etc. set out in paragraph (d) of the definition of Scottish public authority in regulation 2(1) of the EIRs.

Responsibilities, etc. in relation to the environment

32. Whilst the Commissioner is satisfied that Dunbritton is under the control of SHR, it can only be a Scottish public authority for the purposes of the EIRs if it also has public responsibilities relating to the environment, exercises functions of a public nature relating to the environment or provides public services relating to the environment.
33. Dunbritton provides housing for rent to people in housing need and houses for sale under its shared ownership scheme. Dunbritton’s website³ states that it is also a developer, building good quality houses for rent and shared equity.
34. The Commissioner considers that Dunbritton’s public responsibilities in relation to the provision, construction, improvement and management of social housing relates to the environment. The construction of new social housing, improvements made to existing housing structure and the repair and planned maintenance of existing housing can have significant effects on energy use. Energy is a factor included in regulation 2(1)(b) (definition of “environmental information”) of the EIRs; reducing energy use in housing can have a positive effect in reducing carbon dioxide emissions and therefore the state of the air and atmosphere.

³ <http://www.scottishhousingconnections.org/HA/Dunbritton/About-Us/>

35. The Scottish Social Housing Charter⁴ (SSHC) sets out the standards and outcomes that all social landlords should aim to achieve when performing their housing activities. In relation to housing quality and maintenance, it states that social landlords should manage their businesses so that tenants' homes, as a minimum, meet the Scottish Housing Quality Standard⁵ (SHQS) by April 2015 and continue to meet it thereafter. The SSHC also states that, beyond that, landlords should be looking for cost-effective ways of achieving higher energy-efficient standards for their properties, to provide warmer homes for their tenants and help to meet climate change standards.
36. The SHQS provides that housing must be compliant with the tolerable standard, free from serious disrepair, energy efficient, have modern facilities and services and be healthy, safe and secure. The "energy efficient" criterion includes standards for effective insulation (cavity, loft and water pipes) and efficient heating (including acceptable efficiency ratings). The "healthy, safe and secure" criterion includes having adequate noise insulation and being free of lead pipe-work. In the Commissioner's view, the criteria of the SHQS fall within the definitions of "environmental information" in regulation 2(1)(b), (c) and (f) being factors and measures affecting, or likely to affect the elements of the environment or the state of human health and safety inasmuch as they may be affected by the state of the elements of the environment.
37. Having considered Dunbritton's responsibilities in relation to the SSHC and SHQS, the Commissioner is satisfied that it has public responsibilities relating to the environment.

Conclusion

38. The Commissioner is therefore satisfied that Dunbritton is a Scottish public authority by virtue of definition (d) of Scottish public authority in regulation 2(1) as it is under the control of SHR and has public responsibilities relating to the environment.

Decision

The Commissioner finds that Dunbritton Housing Association Ltd (Dunbritton) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr X:

- (i) By initially informing Mr X that it was not a Scottish public authority for the purposes of the EIRs, Dunbritton failed to comply with regulation 5(1).
- (ii) By failing to respond to Mr X's request for review, Dunbritton failed to comply with regulations 16(3) and (4) of the EIRs.

The Commissioner requires Dunbritton to carry out a review and inform Mr X of the outcome as required by regulation 16 of the EIRS by 17 July 2014.

Appeal

⁴ <http://housingcharter.scotland.gov.uk/media/34241/the%20scottish%20social%20housing%20charter.pdf>

⁵ <http://www.scotland.gov.uk/Topics/Built-Environment/Housing/16342/shqs>

Should either Mr X or Dunbritton Housing Association Ltd 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 Dunbritton Housing Association Ltd fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that Dunbritton Housing Association has failed to comply. The Court has the right to inquire into the matter and may deal with Dunbritton Housing Association as if it had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner
2 June 2014

Appendix 1: Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

“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;
- (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;
- ...
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

“Scottish public authority” means –

- (a) any body which, any other person who, or the holder of any office which is-
 - (i) listed in schedule 1 to the Act (but subject to any qualification in that schedule), or
 - (ii) designated by order under section 5(1) of the Act;
- (b) a publicly-owned company as defined by section 6 of the Act;
- (c) any other Scottish public authority with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998); and
- (d) any other person who is neither a public body nor the holder of a public office and who is under the control of a person or body falling within paragraphs (a), (b) or (c) of this definition and-

- (i) has public responsibilities relating to the environment;
- (ii) exercises functions of a public nature relating to the environment; or
- (iii) provides public services relating to the environment; and

"working day" has the same meaning as in section 73 of the Act.

...

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)-
 - (a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and
 - (b) is subject to regulations 6 to 12.

...

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.
- (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.

Appendix 2: Summary of relevant sections of Housing (Scotland) Act 2010

1. Section 34 of the 2010 Act provides that SHR may set performance improvement targets specifying the level or quality of housing services or the standard of housing activities which social landlords (including RSLs) must aim to provide by a specified time. Different performance targets, or different times, may be set for different social landlords. Section 37 of the 2010 Act provides that SHR may set financial management or governance targets specifying standards of financial management or governance which RSLs must aim to achieve by a specified time. Different financial management or governance targets, or different times, may be set for different RSLs.
2. Part 4 of the 2010 Act (Inquiries and Information) permits SHR to make inquiries about social landlords in relation to their housing activities or financial or other affairs. SHR has general powers under sections 42 and 43 of the 2010 Act to access premises, documents or other information relating to the social landlord concerned which SHR believes to be relevant to its inquiries. The social landlord concerned must provide such facilities and assistance as SHR reasonably requests in connection with the inquiries. Any person holding or accountable for any document or other information required by SHR must, if required, produce the document or information.
3. Section 44 of the 2010 Act also allows SHR to arrange for a survey of the condition of housing accommodation where it suspects that the standard to which it is being maintained means that the social landlord is at risk of failing to meet a specified standard, outcome or target.
4. Additionally, under section 45 of the 2010 Act, SHR may, as part of its inquiries about a RSL's financial or other affairs, arrange for an audit to be undertaken into the RSL's accounts and balance sheet.
5. Part 5 of the 2010 Act (Regulatory Intervention) sets out SHR's powers of regulatory intervention and remedial action.
6. Section 55 of the 2010 Act applies where SHR considers that a social landlord is, or is at risk of, failing to achieve a standard or outcome set out in the Scottish Social Housing Charter or failing to meet a performance improvement target. Additionally, it applies where a RSL is, or is at risk of, failing to meet a financial management or governance target or there has been misconduct or mismanagement in its financial or other affairs.
7. In such circumstances, SHR can require a social landlord to submit a performance improvement plan setting out how and by when it proposes to rectify or avoid the failure or other problem. SHR may then approve or reject an improvement plan submitted to it. A performance improvement plan which has been approved by SHR must then be implemented by the social landlord concerned. If an improvement plan is rejected by SHR, the social landlord must submit a revised plan to SHR.
8. Section 56 of the 2010 Act provides that SHR may serve an enforcement notice if it considers that a social landlord is, or is at risk of failing: to achieve a standard or outcome set out in the Scottish Social Housing Charter, to meet a performance improvement target or to implement an approved performance improvement plan. An enforcement notice can also be served on an RSL where SHR considers the RSL is, or is at risk of failing to meet a financial management or governance target or where there has been misconduct or mismanagement in the RSL's financial or other affairs. An enforcement notice under section 56 requires the

social landlord to take action to rectify or avoid a failure or other problem or to protect its tenants or assets.

9. Under section 57 of the 2010 Act, SHR may appoint, or require a social landlord to appoint, a manager to manage its housing activities generally or to manage particular aspects of those activities. SHR may do so where it considers that a social landlord is, or is at risk of failing:
 - (i) to achieve a standard or outcome set out in the Scottish Social Housing Charter,
 - (ii) to meet a performance improvement target, or
 - (iii) to implement an approved performance improvement plan or to comply with an enforcement notice.SHR may do so when it considers that a person needs to be appointed in order to ensure that the social landlord provides housing services to an appropriate standard.
10. Section 58 of the 2010 Act provides that SHR may appoint a manager in similar circumstances to manage a RSL's financial or other affairs generally or to manage particular aspects of those affairs.
11. Under section 60 of the 2010 Act, SHR may remove an officer of a RSL in certain specified circumstances including where that officer is impeding the proper management of the RSL because of absence or other failure to act. Section 61 allows SHR to suspend an officer in specified circumstances. These include where there has been misconduct or mismanagement in a RSL's financial or other affairs or where the interests of the RSL's tenants or assets need protection. Under section 65 of the 2010 Act, SHR may appoint a new or additional officer to a RSL.
12. Sections 66 and 67 of the 2010 Act allow SHR to protect a RSL's assets during and following enquiries into its financial or other affairs. Section 66 allows SHR to restrict particular types of transactions or payments. SHR can also direct a bank or other person not to part with any money, assets or securities it holds for the RSL without SHR's consent.
13. Section 67 of the 2010 Act allows SHR to transfer the RSL's assets to another RSL if it considers there has been misconduct or mismanagement of the RSL's affairs. It can also do so where it considers there is a risk to the RSL's financial viability or governance or it cannot provide housing services to an acceptable standard.
14. Under section 93 of the 2010 Act, RSLs must obtain the consent of SHR for any changes to their constitution, for example changes to their rules, memorandum or articles.

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