

Decision Notice 119/2020

Architect's report and invoice

The Applicant

Public authority: Scottish Borders Council

Case Ref: 201902284



Scottish Information
Commissioner

Summary

The Council was asked for, amongst other things, an architect's report and invoice pertaining to roof repairs on properties at Innerleithen.

The Council considered the request under the EIRs and disclosed some information, withholding other information. The Applicant did not contest some of the withheld information but was dissatisfied that the architect's report and invoice had not been disclosed.

The Commissioner investigated and was satisfied the searches were adequate and proportionate and that (with the exception of information regarded as exempt and not under consideration here) the Council has provided the Applicant with any information it identified and located.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information") (Interpretation); 5(1) (Duty to make available environmental information on request)

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 20 August 2019, the Applicant made a request for information to the Scottish Borders Council (the Council). The request was for details of the tendering for roof repairs at specified addresses in Innerleithen, including copies of :
 - (i) the architect's report and their invoice;
 - (ii) the quantity surveyor's report and their invoice;
 - (iii) the roof survey and the relevant invoice; and
 - (iv) all the tenders, with names of the contractors redacted if necessary.
2. The Council responded on 17 September 2019, citing section 39(2) of the Freedom of Information (Scotland) Act (FOISA). The information sought was considered to be entirely environmental information and the request was therefore taken forward under the EIRs. Some information was disclosed to the Applicant by the Council, but some was withheld. The Council confirmed that regulation 10(5)(e) was applied to information it considered commercially sensitive, while regulation 11(2) was applied by the Council to information it deemed to be personal data and which could not legally be disclosed in line with data protection requirements..
3. On 6 October 2019, the Applicant wrote to the Council, requesting a review of its decision on the grounds that the response was incomplete, noting in particular that the architect's report and invoice had not been supplied.
4. The Council notified the Applicant of the outcome of its review on 31 October 2019, explaining what it termed "confusion" over the missing information and clarifying points

regarding the naming and content of the “architect’s report”, which it stated had been supplied under a different name (the Tender Report). It also confirmed that it did not yet have the architect’s invoice, as the works were not finished.

5. On 23 December 2019 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 she was dissatisfied with the outcome of the Council’s review because she considered that tender documents circa May 2019 were missing, in particular the architect’s report, and that an invoice should exist as she had already been informed of her share of the architect’s fees.

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 7 January 2020, the Council was notified in writing that the Applicant had made a valid application. 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 how it had identified and located information capable of addressing the terms of the request.
9. As the Applicant has not complained of the application of two exemptions to withhold information, these elements need not be considered further in this decision notice.

Commissioner’s analysis and findings

10. In coming to a decision on this matter, the Commissioner 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.
11. The Applicant has not challenged the Council’s decision to deal with the requested information as environmental information, in accordance with the EIRs. The Commissioner is satisfied the information falls within the definition of “environmental information” in regulation 2(1) of the EIRs (see Appendix below) and will consider the handling of the request in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs

12. The Applicant submitted that there was missing information, in that it was clear from the disclosed documents that more information was held by the Council and should have been provided at the time of asking. Specifically, more information ought to be disclosed surrounding a “failed” tender process in May 2019 and the architect’s report and invoice had yet to be provided.
13. Regulation 5(1) of the EIRs (subject to the various qualification 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. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, 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 a public authority to explain why it does not hold the information, and any reason offered by an applicant to explain why an authority is likely to hold information. While it may be relevant as part of this exercise to explore what information should be held, ultimately the Commissioner's role is to determine what relevant information is (or was, at the time the request was received) held by the public authority.
15. In the review outcome (31 October 2019) the Council explained that in effect there was a failed attempt at starting the tender process online; an unopened tender was returned to the sender and the whole process was then re-started successfully. The Council confirmed it was satisfied that all relevant information it held was identified at the time of asking and provided to the Applicant, subject to some redactions.

Searches

16. During the investigation the Council was asked to re-check its searches, in particular with regard to the architect's invoice and any communications with the Applicant regarding her share of costs: the Applicant commented during the investigation as to why she expected this information to be both held and capable of disclosure.
17. The Council provided details of the searches, confirming that all the information caught by this request was held in a single location, i.e. the project folder. A screenshot was provided. The Council confirmed that no information had been destroyed, as the project was still ongoing.
18. With regard to an architect's report, the Council re-iterated its explanations in the review on the naming of documents and their content to the effect that there was no "architect's report" as such, the tender report (provided to the Applicant) being the only relevant document prepared by the architects. Also, there would be no "invoice": a fee was agreed internally, identified in the tender report and paid on satisfactory completion of the works. It was not aware of the Applicant having been notified (in writing) of a sum payable as a share of architect's fees.
19. The Tender Report within the tender documentation, disclosed to the Applicant, was prepared by a member of the Council's architectural staff and contains professional advice on the tenders submitted. As the Council has submitted, and as explained to the Applicant in the review outcome, it appears to be the only document held by the Council which could fall within the description of an "architect's report". In the circumstances, the Commissioner also accepts the Council's submission that an "architect's invoice", even as the basis for apportioning internal costs, could not reasonably be expected to exist at the time the request was received, given that the project remained ongoing: again, this is basically what was communicated to the Applicant in the review outcome.
20. Having considered all the relevant submissions and the terms of the request, therefore, the Commissioner is satisfied that any information held by the Council and falling within the scope of the Applicant's request was capable of being identified by the searches carried out by the Council. He is satisfied that the Council took adequate, proportionate steps to establish what information it held that was relevant to the request, and (with the exception of information regarded as exempt and not under consideration here) provided the Applicant with any information identified and located as a result.

Decision

The Commissioner finds that, in the matters specified in the application, Scottish Borders Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the Applicant.

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

1 October 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 –

(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.

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