

Decision Notice

Decision 121/2017: Stephen Sloper and Falkirk Council

Planning issues and work carried out at a specified site

Reference No: 201700260

Decision Date: 1 August 2017



Scottish Information
Commissioner

Summary

The Council was asked for information concerning planning issues and work carried out at a specific site in the Falkirk Council area. The Council disclosed some information, explaining that it had interpreted the request as relating only to work carried out at the site recently.

The Commissioner investigated and found that the Council had interpreted the scope of the request too narrowly. She required the Council to provide reasonable advice and assistance to Mr Sloper, with a view to clarifying the scope, and to issue a revised review outcome.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 5(1) and (2) (Duty to make available environmental information on request); 7(1) (Extension of time); 9(1) and (3) (Duty to provide advice and assistance); 16(1), (3) and (5) (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.

All references to “the Commissioner” in this decision are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. Mr Sloper made a request for information in a letter (wrongly) dated 13 September 2016 to Falkirk Council (the Council). This was received by the Council on 14 October 2016. Mr Sloper requested a range of information concerning planning issues and work carried out at a specified location in the Falkirk Council area.
2. The Council responded on 7 November 2016, informing Mr Sloper that it considered the information requested to be environmental information. Consequently, the Council decided to handle the request under the Environmental Information (Scotland) Regulations 2004 (the EIRs). The Council further informed Mr Sloper that, as it considered the information requested to be complex and voluminous, it was extending the period for responding by an additional 20 working days.
3. On 11 November 2016, the Council wrote to Mr Sloper. In response to one part of his request, with an explanation, the Council stated that it held no recorded information.
4. On 12 December 2016, the Council wrote again to Mr Sloper. On this occasion, the Council disclosed some information to him, withholding the remainder as it considered it to be excepted from disclosure in terms of regulation 10(4)(e) of the EIRs. The Council considered the withheld information comprised internal communications, and that the public interest in making the information available was outweighed by that in maintaining the exception.
5. On 15 December 2016, Mr Sloper wrote to the Council. He referred to the Council’s letter of 7 November 2016. Mr Sloper queried the Council’s interpretation of his request, which he believed had allowed it to respond to an alternative question; he considered this

unacceptable. Mr Sloper also expressed dissatisfaction that insufficient information had been disclosed to him by the Council; in his view, the Council had purposely withheld information which should have been disclosed.

6. On 4 January 2017, Mr Sloper wrote to the Council again. In this letter, Mr Sloper listed specific information he considered the Council ought to have disclosed in response to his request but which had not been disclosed to him.
7. On 20 January 2017, the Council wrote to Mr Sloper. The Council explained that it considered aspects of Mr Sloper's letters of 15 December 2016 and 4 January 2017 to comprise a request for review under the EIRs. It also stated that it considered some aspects of his letter of 4 January 2017 to comprise a new request for information.
8. Within its letter of 20 January 2017, the Council responded to the aspects of Mr Sloper's letters of 15 December 2016 and 4 January 2017 which it had treated as a request for review. The Council stated that Mr Sloper's request (received on 14 October 2016) had sought information regarding specific (and recent) work carried out at the site in question. The Council confirmed its earlier decision (12 December 2016) to withhold information under regulation 10(4)(e) of the EIRs. The Council stated also that it would respond separately to the aspects of Mr Sloper's recent letters which, in its view, comprised new requests for information.
9. On 8 February 2017, Mr Sloper wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Mr Sloper stated he was dissatisfied with the outcome of the Council's review because he did not consider the Council had disclosed all of the information it held and which fell within the scope of his request. Mr Sloper disputed that his request concerned only recent aspects of the work carried out at the site in question.

Investigation

10. The application was accepted as valid. The Commissioner confirmed that Mr Sloper made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
11. On 10 March 2017, the Council was notified in writing that Mr Sloper 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 answer specific questions. In particular, the Council was asked to explain: (i) the searches it had undertaken in order to identify, locate and retrieve any relevant information and, (ii) why it had interpreted Mr Sloper's request as relating only to recent work carried out at the site in question.
13. The Council responded, explaining why it had interpreted Mr Sloper's request as one seeking information only in relation to recent work carried out at the site. The Council also explained the records it had searched in order to identify, locate and retrieve information which it considered fell within the scope of Mr Sloper's request.

14. Following further discussions with the investigating officer, Mr Sloper continued to dispute the Council's interpretation of his request. He subsequently supplied additional correspondence which, in his view, evidenced his position that his request had not been limited to recent work carried out at the site. He also provided a copy of a letter from the Council (dated 5 May 2017) which appeared to be a response to his letter of 4 January 2017.
15. Also during the investigation, Mr Sloper informed the investigating officer that he had attended the Council's premises in order to view documents on site. He submitted that much of the information that he had requested was still not available.

Commissioner's analysis and findings

16. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both Mr Sloper and the Council. She is satisfied that no matter of relevance has been overlooked.

The Council's interpretation of the request

17. In its submissions to the Commissioner, the Council stated that it had interpreted Mr Sloper's request as one which related only to recent work carried out at the site. In the Council's view, this had been the thrust of Mr Sloper's correspondence.
18. The Council stated that, in relation to the information falling within (its interpretation of) the scope of Mr Sloper's request, there was little or no recorded information. This was to be expected, in the Council's view, in relation to works it considered to be permitted development. The Council also confirmed the work areas and systems within the authority where relevant information would be held concerning the subject of the request.
19. Mr Sloper disputed the Council's interpretation of his request. He did not accept that his request related only to recent works at the site. He referred to previous correspondence with the Council which, in his view, made it clear that the request encompassed information going back considerably beyond the recent works and the time period envisaged by the Council.
20. The Commissioner has considered the arguments put forward by both Mr Sloper and the Council and the additional correspondence supplied by Mr Sloper during the investigation.
21. The Commissioner notes that the Council, in its initial response of 7 November 2016, informed Mr Sloper that it had decided to extend the timescale for complying with his request by an additional 20 working days. The Council informed Mr Sloper that this was because the information requested was "complex and voluminous".
22. Regulation 5(1) of the EIRs provides that a Scottish public authority that holds environmental information shall make it available (to an applicant) as soon as possible, and no later than 20 working days after the request has been received. Regulation 7(1) of the EIRs permits the authority to extend the period of 20 working days by a further period of up to 20 working days, if the volume and complexity of the information requested makes it impracticable for the authority to respond to the request within the earlier period.
23. The Commissioner notes also that, in its submissions explaining why it interpreted Mr Sloper's request as relating only to recent works on the site, the Council stated that there was little or no recorded information held. While the Council's reasons for taking this position may have been rational, if a narrow interpretation of the request is accepted, it is a position

which completely contradicts the Council's initial decision to extend the period for complying with Mr Sloper's request on the basis of the volume and complexity of the information.

24. The Commissioner has considered the terms of Mr Sloper's request of 13 September 2016 and the previous correspondence between him and the Council. She has also noted the Council's stated position (in its letter of 7 November 2016) regarding the volume and complexity of the information requested. Additionally, she has taken account of the Council's submission to the effect that it held little or no information relating to the recent works at the site. This was the information it had stated fell within the scope of Mr Sloper's request in its letter to him of 20 January 2017.
25. The Commissioner has also considered the terms of Mr Sloper's letters to the Council of 15 December 2016 and 4 January 2017. In the Commissioner's view, these clearly express dissatisfaction with the Council's handling of his request and comprise valid requirements for review for the purposes of regulation 16(1) of the EIRs, in their entirety. In particular, the letter of 4 January 2017 lists specific information (within the scope of his original request) which Mr Sloper considers ought to have been disclosed to him: these are not, on any reasonable interpretation, additional requests for information.
26. In all the circumstances of this case, the Commissioner cannot accept the Council's limited interpretation of his request. The terms of the request itself, particularly when read in the context of his other correspondence with the Council, provide no justification for a narrow interpretation. Additionally, there would have been no need to extend the period for responding on grounds of volume and complexity if Mr Sloper was seeking only the limited information claimed by the Council. That perceived need suggests an understanding that the request was intended to be interpreted in wider terms.
27. The Commissioner finds therefore that the Council did not interpret Mr Sloper's request for information reasonably, by limiting it to recent works carried out at the site. The request appears to be intended, at least, to cover the wider process of reinstatement at the site in question and aspects of a related planning agreement. If the Council had found it unclear in any way, it should have sought clarification from Mr Sloper. There would certainly appear to be no justification, as the Council has attempted to do, for applying a more technical definition of the word "development" (even if that might have been justified technically, in terms of Planning Law) than the ordinary dictionary definition which might be understood by a lay person.
28. In interpreting the request as it did, the Commissioner finds that the Council breached regulation 5(1) of the EIRs.

Regulation 9 of the EIRs – Duty to provide advice and assistance

29. Regulation 9 of the EIRs requires Scottish public authorities to provide advice and assistance to applicants, so far as it would be reasonable to expect them do so. Regulation 9(3) provides that Scottish a public authority shall be taken to have complied with this duty if it conforms with the guidance contained in the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the Environmental Information (Scotland) Regulations (the Section 60 Code of Practice).
30. The Section 60 Code of Practice, both in the version¹ in force at the time the Council received Mr Sloper's request and, in the version² in force when it responded to his request

¹ <http://www.gov.scot/Resource/0046/00465757.pdf>

for review contain recommended good practice in relation to the provision of advice and assistance. This includes guidance (in both versions) on performing the duty to provide advice and assistance by seeking clarification from an applicant if the authority is unsure about what information the applicant wants.

31. In the Commissioner's view, it ought to have been clear to the Council, from the terms of Mr Sloper's correspondence regarding its handling of his request, that he disputed the Council's interpretation of the request. As such, it ought to have discussed the terms and parameters of his request under the duty to provide advice and assistance. Had the Council taken this course of action, it may have avoided the need for Mr Sloper to make an application to the Commissioner.
32. The Commissioner is aware that, subsequent to his application to the Commissioner, the Council permitted Mr Sloper to view some documents at its premises. However, it is clear that Mr Sloper remains dissatisfied with the information he has been permitted to view and considers there is additional relevant information which has not been identified. The provision of access does not appear to have been accompanied by any attempt to discuss the parameters of the request, or otherwise to engage actively with Mr Sloper with a view to resolving what appears to be a lack of meeting of minds in relation to these parameters.
33. It is clear that there remains a significant difference of opinion between Mr Sloper and the Council in relation to what information is (and ought to be) held. The Commissioner considers this has not been helped by the Council's handling of Mr Sloper's request for information; in particular, the piecemeal manner in which the Council responded and the flawed interpretation of the request.
34. The Commissioner considers it would have been reasonable (and, indeed, desirable) for the Council to engage with Mr Sloper to ascertain exactly what information he was seeking. Without a clear view of what was being sought, the Commissioner cannot see how the Council could properly take a considered view of what information was covered by the request and correctly discharge its duties under the EIRs.
35. The Commissioner finds that, in the particular circumstances of this case, the failure to engage properly with Mr Sloper in relation to his information request of 16 September 2016 amounted to a failure to provide reasonable advice and assistance under regulation 9(1) of the EIRs.
36. In the circumstances, the Commissioner now requires the Council to provide advice and assistance to Mr Sloper in terms of regulation 9(1) of the EIRs, with a view to reaching a clear (and ideally shared) understanding of the scope of the request and, on that basis, to issue a revised review outcome in line with regulation 16 of the EIRs.
37. The Commissioner suggests it would be appropriate for the Council to arrange to meet with Mr Sloper in order to discuss fully the parameters of his request. The Council should ascertain fully the reasons for his dissatisfaction with its handling of his request and establish the information he believes the Council holds and which (to date) does not appear to have been identified.

² <http://www.gov.scot/Resource/0051/00510851.pdf>

Decision

The Commissioner finds that Falkirk Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Sloper. The Commissioner finds that the Council failed to:

- (i) comply with regulation 5(1) of the EIRs by incorrectly interpreting Mr Sloper's request, and
- (ii) provide reasonable advice and assistance to Mr Sloper to enable it to identify the specific information that he was seeking and therefore failed to comply with regulation 9(1) of the EIRs.

The Commissioner requires the Council to provide Mr Sloper with reasonable advice and assistance and to issue a revised review response in line with regulation 16 of the EIRs by **15 September 2017**.

Appeal

Should either Mr Sloper or Falkirk 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 Falkirk Council (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
Acting Scottish Information Commissioner

1 August 2017

The Environmental Information (Scotland) Regulations 2004

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.

...

7 Extension of time

- (1) The period of 20 working days referred to in-
 - (a) regulation 5(2)(a);
 - (b) regulation 6(2)(a); and
 - (c) regulation 13(a),

may be extended by a Scottish public authority by a further period of up to 20 working days if the volume and complexity of the information requested makes it impracticable for the authority either to comply with the request within the earlier period or to make a decision to refuse to do so.

...

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.

...

16 Review by Scottish public authority

(1) Subject to paragraph (2), an applicant may make representations to a Scottish public authority if it appears to the applicant that the authority has not complied with any requirement of these Regulations in relation to the applicant's request.

...

(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.

...

(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.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info