

Decision Notice

Decision 177/2018: Mr F and Southside Housing Association

Improvement works at properties

Reference No: 201800486

Decision Date: 8 November 2018



Summary

SHA was asked a number of questions about improvement works at two properties in Glasgow. SHA initially failed to respond to the request, but later disclosed some information. It withheld two reports.

Following an investigation, the Commissioner concluded that the information in the reports was not environmental information. As such, SHA, a body which is not subject to FOISA, was under no obligation to make it available.

However, more information was located by SHA during the investigation. This was disclosed, but the Commissioner found that SHA had breached the EIRs by failing to locate and disclose it at an earlier stage.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a), (b), (c) and (f) of “environmental information” and definition of “Scottish public authority”), 5(1) and (2)(a) (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. Both Appendices form part of this decision.

Background

1. On 4 October 2017, Mr F made a number of information requests to Southside Housing Association (SHA) about improvement works at Moss Heights Avenue and Berryknowes Road in Glasgow. The requests are set out in full in Appendix 2.
2. At the time of submitting this request, Mr F made an identical request to Southside Factoring and Related Services (SFRS).
3. On 1 November 2017, SHA wrote to Mr F, offering to meet with him to obtain “more specific details” (which it said it required) in relation to his requests.
4. No meeting took place and, on 11 November 2017, Mr F wrote to SHA requesting a review of its decision on the basis that it had failed to respond to his requests.
5. SHA notified Mr F of the outcome of its review on 23 November 2017. SHA stated that it did not consider SFRS to be subject to the EIRs and, consequently, it confirmed that its response was from SHA alone. SHA provided Mr F with some information; explained that it did not hold some of the information he had requested and withheld copies of two reports on the basis that they were “sensitive and confidential”.
6. On 4 March 2018, Mr F applied to the Commissioner for a decision (in relation to SHA alone) 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.

7. Mr F was dissatisfied with the outcome of SHA's review because:
 - (i) he felt he had not been provided with all the information falling within the scope of his requests
 - (ii) he did not accept that information that had been identified should be withheld
 - (iii) he was unhappy with the time taken to respond to his requests.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that Mr F made requests for information to a Scottish public authority (as defined by regulation 2 of the EIRs – see below) and asked the authority to review its response to those requests before applying to him for a decision.
9. On 5 April 2018, SHA was notified in writing that Mr F had made a valid application. SHA was asked to send the Commissioner the information withheld from Mr F. SHA did so and the case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. SHA was invited to comment on this application and to answer specific questions, including justifying its reliance on any provisions of the EIRs it considered applicable to the information requested.
11. SHA provided submissions, explaining the searches it had conducted.
12. During the investigation, SHA advised the Commissioner that it had located further information falling within the scope of Mr F's request. SHA provided this information to Mr F.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner considered all of the withheld information and relevant submissions, or parts of submissions, made to him by both Mr F and SHA. He is satisfied that no matter of relevance has been overlooked.

SHA as Scottish public authority

14. SHA is not a Scottish public authority for the purposes of section 3(1) of FOISA.
15. However, as a registered social landlord, the Commissioner is satisfied that SHA is a Scottish public authority for the purposes of definition (d) of "Scottish public authority" in regulation 2(1) of the EIRs (see *Decision 118/2014 Mr X and Dunbritton Housing Association Ltd*¹). SHA has not challenged this position.
16. This means that SHA must, subject to the exceptions, etc. in the EIRs, make the environmental information it holds available when requested to do so.

¹ <https://www.itspublicknowledge.info/uploadedFiles/Decision118-2014.pdf>

Is the information Mr F requested “environmental”?

17. “Environmental information” is also defined in regulation 2(1) of the EIRs (the relevant parts of the definition are reproduced in Appendix 1). Where information falls within the scope of the definition, a person has a right to access it under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
18. It is clear from Mr F’s and SHA’s correspondence, and from the information made available to Mr F, that the information that he seeks, with the exception of the reports requested under request (a) (see below) is environmental information: the information relates to heating renewal projects across various residential buildings, and engages paragraphs (a), (b), (c) and (f) of the definition.

Copies of investigation reports (Request (a))

19. SHA withheld two investigation reports in response to Mr F’s request. In withholding these reports, SHA explained that it did not consider them to be related to the heating renewal projects. In its submissions to the Commissioner, SHA confirmed that the two reports reflected a general investigation into allegations about procurement more generally.
20. The Commissioner has considered these reports in detail and has concluded that they do not fall within the definition of environmental information in regulation 2(1). The reports are a review of procurement arrangements generally within SHA and are not specific to the renewal of the heating systems at the named properties or, indeed, to other procurement which would impact on the environment.
21. As these reports do not fall within the definition of environmental information, SHA is under no obligation to make them available. This means the Commissioner cannot consider request (a) in this decision notice.

Did SHA identify all relevant information? (Requests (b) – (g))

22. In his application to the Commissioner, Mr F suggested that more information should have been identified and provided to him as a result of his requests, including:
 - (i) Management Committee and proprietor meeting information.
 - (ii) Documentation relating to Berryknowes Road.
 - (iii) Documentation relating to complaints.
 - (iv) Communications between SHA and the Scottish Housing Regulator (SHR).
 - (v) Paperwork relating to grant funding applications.
 - (vi) Financial data including historical invoices.
 - (vii) Tender from a named contractor and communications relating to this.
23. Regulation 5(1) of the EIRs, subject to various qualifications (regulation 5(2)(b)), requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request.

24. It is also important to note that the Commissioner can only consider information held by SHA; information held by its commercial subsidiary, SFRS, which is not subject to the EIRs, and which Mr F's application does not relate to, cannot be considered.
25. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held. While it may be relevant as part of this exercise to explore expectations as to what information the authority should hold, ultimately the Commissioner's role is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).
26. The Commissioner has taken account of the submissions provided by Mr F, in which he provides reasons why he considers SHA should hold further information falling within the scope of his request.

General searches

27. SHA stated that the search for historical material was complex, given that it involved the parent company (SHA) and its subsidiary (SFRS). As stated above, Mr F's application is restricted to consideration of environmental information held by SHA and not by SFRS.
28. SHA conducted a search of both hard copy and electronic files from the point of receipt of Mr F's request back to 2012 when SHA first factored the properties in question.
29. In addition to searches of shared drives, using key terms such as "Moss Heights Avenue Heating", "Berryknowes Road Heating" and "McGills", SHA also undertook an extensive trawl of individual staff files.
30. SHA explained that it uses the Microsoft Office suite of software. This is largely used as a shared drive, but staff can also retain their own files that are not on the shared system.
31. SHA named the members of staff that were asked to conduct searches and explained why they were relevant to the subject matter of this request:
 - (i) Head of Development: responsible for procuring the works at Moss Heights and would have led on Berryknowes Road, if a scheme had been developed.
 - (ii) Factoring Manager: an employee of SHA, but is a manager for SFRS. The Factoring Manager attended meetings with the owners in 2012 and 2013 in an attempt to develop a proposal for Berryknowes Road.
 - (iii) IT Manager: conducted all electronic file searches on SHA's shared directory.
32. SHA acknowledged that it has a legal duty to hold some of the information Mr F had requested; contracts for building works, financial records, regulatory obligations, etc. would fall into this category. However, SHA stated that it was under no duty to retain details of factoring arrangements from 2012-2013; unsuccessful efforts to develop improvement works or non-contractual communications with third parties.

Management committee and proprietor meetings and documentation relating to Berryknowes Road

33. With specific reference to the search for Management committee information, SHA confirmed that all minutes, agendas and supporting papers are held centrally in a clear chronological order. SHA supplemented the electronic "Word" searches with manual checks of hard

copies. When asked specifically about the lack of proprietor meetings minutes, SHA explained that these would have been held by SFRS (and not by SHA). SHA also believed that Mr F would already have access to these.

34. SHA submitted that there was very little Management committee information held on Berryknowes Road, due to the fact that no project went ahead for this address. SHA explained that this was in sharp contrast to Moss Heights Avenue, where a full design and tender exercise was carried out, and where SHA went on site for major works.
35. During the course of the investigation, SHA reviewed this part of Mr F's request and confirmed that there were no proprietor meeting minutes held by SHA for Berryknowes Road. SHA confirmed that minutes of proprietor meetings would be held by SFRS: any minutes that SHA held would only be as a result of them being held on a complaint file.
36. SHA also conducted a further review of all Committee minutes and reports from 2012-2017, resulting in the identification of some additional, but limited, material, which fell within the scope of Mr F's request. These were largely passing references to Moss Heights Avenue and references to complaints received in relation to Berryknowes Road.
37. The additional material identified was, at the request of the investigating officer, disclosed to Mr F by SHA during the course of the investigation. (Personal data and information which was not within the scope of Mr F's requests was redacted.)
38. Included in this documentation was a copy of the minutes of a proprietors meeting on 18 February 2013 (subject to the redaction of personal data) which was, strictly, held by SFRS but provided to Mr F in the interests of transparency.

Documentation relating to complaints

39. When questioned about the lack of material supplied in relation to complaints, SHA acknowledged that it held further information. SHA explained that it had not previously included this information for the following reasons:
 - (i) Mr F already had access to this information.
 - (ii) SHA had not been provided with consent from the individuals concerned (i.e. those making the complaints) to share this information with others.
40. SHA provided a copy of this additional complaint material to the Commissioner. On review of the material provided, it was evident that much of it was either authored by one of three individuals or consisted of SHA's responses to these individuals. Given that Mr F was aware of, or otherwise had access to, this information, he agreed with the investigating officer that this information would not be considered further in this investigation.
41. However, Mr F confirmed that he still considered copies of complaint-related correspondence between SHA and SHR to fall within the scope of his request and he questioned why this had not been disclosed to him.

Correspondence between SHA and SHR

42. Mr F believed that further correspondence between SHR and SHA should have been disclosed to him. He referred to SFRS's complaints handling procedure and suggested that the matter in question should have been a "notifiable event"; as such, the SHR should have been informed. (The procedure notes that a serious complaint against senior staff or the governing body of an RSL is a "notifiable event" and that the SHR must be informed immediately.)

43. SHA explained that all formal communications with SHR would be held centrally and reported to the Management committee. Informal communications would be held on the email system, but would only be retained for a relatively short period.
44. SHA stated that its communications with SHR was very limited and that it had provided all correspondence it held in relation to works at Moss Heights Avenue and Berryknowes Road to Mr F. It commented that it processes 50-100 complaints in a year and that it would be disproportionate and inappropriate to inform SHR of each complaint.
45. It explained that SHA reports annually on the number of complaints it receives in the Annual Return on the Scottish Housing Charter, but this simply records the number of complaints and whether they are Stage 1 and Stage 2, or if they have escalated to the Scottish Public Services Ombudsman or the First Tier Housing Tribunal.
46. SHA confirmed that there was no correspondence between SHA and SHR in relation to the complaints in question.

Funding applications

47. SHA explained that “paperwork” with funders would only exist if there was a formal funding process. This would be held by individual members of staff, rather than on central files.
48. In response to Mr F’s request, SHA provided copies of two formal funding applications to Scottish Power, both relating to Moss Heights Avenue. SHA explained, as stated above, no detailed project proposal was developed for a tendering exercise. Consequently, any communications with utility companies in 2012 or 2013 would have been informal and not retained.

Financial data

49. SHA uses a modular software system and confirmed that it searched that system at the time of the original request. SHA stated that this is a modular system with no capacity to search on a keyword basis.
50. SHA provided the Commissioner with some examples of its screen shots of its search results to help explain the functionality of its financial systems. SHA explained that its system only holds records of client accounts (invoices, balances, payments, etc.) related to each client. SHA confirmed that the system has a “notepad” facility where records of telephone arrangements can be kept, but SHA was confident that there was no material relevant to Mr F’s requests on the system.

Tender and related documentation

51. SHA explained that tender documentation was most likely to be held in manual records held by individual members of staff. However, documentation relating to unsuccessful tenders was only retained, in line with best practice, for two years.
52. SHA explained that it provided Mr F with the full priced contract awarded to the successful contractor for the Moss Heights Avenue project. SHA stated that no further tender involving that contractor had either been invited or received. As noted above, there was limited data concerning Berryknowes Road as no project went ahead, in contrast with Moss Heights Avenue where a full design and tender exercise was carried out.
53. SHA explained that an individual had asked Glasgow City Council for a copy of a “tender” document from the contractor, but this was simply an indication of likely costs for a project that never proceeded. SHA confirmed that it no longer held this information.

The Commissioner's conclusions

54. It is clear from the information identified during the course of the investigation that SHA failed to identify all of the information it held falling within the scope of Mr F's requests. In assuming that Mr F would not require sight of the complaint material, and in failing to identify the additional references contained in the Management Committee minutes and the proprietor meeting minutes held in its own right, SHA failed to comply with regulation 5(1) of the EIRs.
55. With regards to the remainder of Mr F's requests, having considered all the relevant submissions and explanations provided above, the Commissioner is satisfied (by the close of the investigation) that SHA had taken adequate, proportionate steps to establish whether it held any further information falling within the scope of Mr F's requests.
56. In reaching this conclusion, the Commissioner has taken account of the circumstances surrounding Mr F's requests. It is evident that there are long-standing issues surrounding proposed improvement works related to the named properties, dating back to 2012. However, the Commissioner can only consider what information is actually held by SHA at the time of the request (some five years after the issues were first raised) and not information held by its subsidiary or by any other body related to this request. He is also unable to comment on what Mr F considers should be held by SHA or comment on the accuracy or otherwise of the content of the information supplied.
57. Given that no formal tendering exercise was conducted in relation to the works at Berryknowes Road, the Commissioner considers that it is reasonable to conclude that only limited information would be retained in relation to this subject matter. SHA has also confirmed that it holds no correspondence between it and SHR in relation to the complaints in question.
58. Taking all the above into consideration, the Commissioner is satisfied, on the balance of probabilities, that SHA does not hold further information falling within the scope of Mr F's request.
59. Given that all of the relevant information held by SHA has now been provided to Mr F, the Commissioner does not require SHA to take any action regarding this failure, in response to Mr F's application.

Timescales

60. Regulation 5(2)(a) gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.
61. SHA did not provide a response to Mr F's request within 20 working days. The Commissioner notes that SHA wrote to Mr F on 1 November 2017, i.e. within the 20 working day period, advising him that it required more specific details in relation to the information that Mr F had requested. However, the Commissioner considers that Mr F's requests were clear and did not require further explanation or clarification. In any event, SHA accepted that Mr F had grounds for being dissatisfied and the Commissioner finds that SHA failed to comply with regulation 5(2)(a) of the EIRs.

Decision

The Commissioner finds that Southside Housing Association (SHA) failed to comply in full with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information requests made by Mr F.

By failing to identify and provide Mr F with all of the information it held which fell within the scope of his requests, SHA failed to comply with regulation 5(1) of the EIRs. SHA also failed to comply with regulation 5(2)(a) in failing to provide a response to Mr F's request within the required timescales.

Given that the information identified has now been disclosed, or is otherwise accessible, to Mr F, the Commissioner does not require SHA to take any action in relation to these breaches.

Appeal

Should either Mr F or Southside Housing Association 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.

Daren Fitzhenry
Scottish Information Commissioner

8 November 2018

Appendix 1: Relevant statutory provisions

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

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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;
- ...
- (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

...

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

Appendix 2: Information request of 4 October 2017

- a) A full copy of the 2 investigations carried out in 2016 about procurement/tendering procedures carried out independently at the request of Southside Housing Association.
- b) All data relating to the improvement works at Mossheights Ave and Berryknowes Road concerning heating renewal and grant applications.
- c) All invitations to tender and responses to tenders received concerning the above.
- d) All correspondence and a clear statement of where the information is stored on correspondence between [Southside Housing Association] and [Scottish Housing Regulator] regarding the same.
- e) All documentation including responses to tender of the works placed on the Public Notices Scotland with invitations to Tender and Tenders received and especially the response to all tenders and related information regarding Berryknowes Road.
- f) A full schedule of the grant funding applied for and received under CESP funding from Scottish Power, Glasgow City Council and other bodies clearly outlining what the funding was for.
- g) A schedule of where all the requested documentation is stored.
- h) All information regarding the above held by SFRS [Southside Factoring and Related Services]

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