

Decision Notice



Decision 116/2012 Mr Michael Campbell and the City of Edinburgh Council

Quotation, costing, timescale and scope of works specified in a Statutory Notice

Reference No: 201102103

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Rosemary Agnew
Scottish Information Commissioner

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Summary

Michael Campbell requested from the City of Edinburgh Council (the Council) copies of the timescale, costings, quotation and scope of work that was held by the Council with regard to a specified Statutory Notice at a particular time. After initially failing to respond to Mr Campbell's request, the Council responded to Mr Campbell's request in terms of the Environmental Information (Scotland) 2004 (the EIRs). The Council disclosed some information to Mr Campbell, but Mr Campbell remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had partially failed to deal with Mr Campbell's request for information in accordance with the EIRs.

By providing Mr Campbell with information regarding part (a) of his request, it complied with the EIRs. The Commissioner found that the Council did not hold any information falling within the other parts of Mr Campbell's request, although it had purported to disclose relevant information. The Commissioner found that the Council had failed to comply with its duty to provide advice and assistance in regulation 9 of the EIRs in its handling of Mr Campbell's information request. She did not require any action to be taken because this decision makes the position clear regarding the extent of information held by the Council.

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) (Interpretation – parts (a), (b) and (c) of the definition of environmental information); 5(1) and 5(2)(b) (Duty to make available environmental information on request); 9(1) (Duty to provide advice and assistance); 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 the Appendix to this decision. The Appendix forms part of this decision.



Background

1. Mr Michael Campbell is the owner of a property in Edinburgh that was issued with a Statutory Notice for repairs in June 2008. His mother, Mrs Jackie Campbell, has acted on his behalf in correspondence with the Council regarding this Statutory Notice.
2. All subsequent references to correspondence to and from Mr Campbell should be read as correspondence to and from Mrs Campbell on Mr Campbell's behalf.
3. On 22 September 2008, a Council officer advised Mr Campbell that a contractor had been to the property and that he was waiting for their estimate to be submitted in relation to works required by the Statutory Notice. On 27 November 2008, Mr Campbell received a further email from the Council officer indicating that his correspondence had been forwarded to the surveyor (another Council employee) looking after the repair contract, and that the surveyor would contact him directly with a timescale and any costings that he may have for the work.
4. Mr Campbell did not receive any information regarding a timescale and/or costings from the Council and, on 1 April 2011, he wrote to the Council requesting the following information:
A copy of (a) the scope of work, (b) quotation, (c) costings and (d) timescale received by the Council at that time [i.e. in November 2008] in relation to those repairs.
5. The Council failed to respond to this information request.
6. On 10 May 2011, Mr Campbell wrote to the Council requesting a review of its handling of his request. In particular, Mr Campbell noted that the Council had failed to provide him with a response to his request for information within the required 20 working days.
7. The Council failed to respond to this request for review and Mr Campbell subsequently made an application to the Commissioner, prompting the issue of *Decision 178/2011 Mr Michael Campbell and City of Edinburgh Council*, requiring the Council to respond to his request for review.
8. The Council notified Mr Campbell of the outcome of its review on 13 October 2011 and provided a response to his request. The Council advised Mr Campbell that it had considered his request as one made in terms of the EIRs, having applied the exemption in section 39(2) of FOISA, which provides, in effect, that environmental information is exempt from disclosure under FOISA.



9. The Council provided Mr Campbell with a copy of the relevant Statutory Notice, which specified the scope of the required works (part a); a letter confirming the date (in 2011) when the contractors proposed to commence the works and the contract duration (part d). The Council refused to disclose the quotation and costings sought in parts (b) and (c) of Mr Campbell's request on the grounds that these were personal data of the owners, excepted from disclosure in terms of regulation 11 of the EIRs. However, the Council also advised Mr Campbell that as he also owned one of the affected properties it would disclose the information requested in parts (b) and (c) of his request under the provisions of the Data Protection Act 1998 (DPA).
10. On 9 November 2011, Mr Campbell wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's 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 certain specified modifications.
11. Mr Campbell's application expressed dissatisfaction with the Council's response to him on three grounds.
 - He stated that the Council had not provided the information he had requested, noting that the Council had not provided anything relevant to his request for documentation from 2008, and had not provided any valid reason why that information was not being made available.
 - He commented that the Council had ignored a request to provide the information in terms of the DPA, despite clearly indicating that it would do so.
 - He indicated that he did not consider that the information requested was entirely environmental information, and so it was not all exempt from disclosure under section 39(2) of FOISA.
12. The application was validated by establishing that Mr Campbell had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

13. On 21 November 2011, the Council was notified in writing that an application had been received from Mr Campbell and was asked to provide the Commissioner with any information withheld from him. The Council responded with the information requested and the case was then allocated to an investigating officer.
14. On 22 November 2011, the Council disclosed to Mr Campbell the information it had previously withheld in relation to the quotation and costings for the work (parts (b) and (c)). This was contained in a document dated March 2011.

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15. On 12 December 2011, the investigating officer contacted Mr Campbell seeking clarification of his reasons for his dissatisfaction with the Council's response to his information request. The investigating officer noted that the Council had now supplied information which it considered to meet all parts of his request, but recognised that none of the information disclosed to Mr Campbell dated from the date in November 2008 that had been mentioned in his request.
16. Mr Campbell was asked to confirm whether he considered the information disclosed to have met the different parts of his request. The investigating officer also noted that personal data of third parties had been redacted from some of the documents supplied, and asked whether Mr Campbell wished to challenge the Council's decision to withhold such information.
17. Mr Campbell responded on 19 December 2011, expressing continued dissatisfaction that the information the Council had identified as falling within the scope of his request did not do so, and that consequently the Council had failed to comply with the terms of his request for information. The reason for this dissatisfaction was that the request was seeking information relating to the quotes that were referred to in 2008. He noted that he already had a copy of the statutory notice, and the other information related to the quotation, costings and timescale for work generated in 2011. He reiterated that his request was intended to seek information relating to the quotation and costings that he understood to have been received by the Council in 2008, and the scope of works and timings associated with those costings. Mr Campbell confirmed that he was not seeking personal data.
18. Following receipt of this clarification, the investigating officer contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to consider whether it held the information requested by Mr Campbell, given that the information it had thus far identified as falling within the scope of his request did not relate to costings received in the autumn of 2008, the time period relevant for Mr Campbell's request.
19. The Council responded on 7 February 2012. In its response, the Council argued that the information it had identified and disclosed to Mr Campbell did fall within the scope of his request as it directly related to the specified statutory notice. The Council submitted that it held no further information of relevance and it argued that it was not withholding any information from Mr Campbell.
20. In further communications, the investigating officer contacted the Council raising additional queries about its submissions. In doing so, the investigating officer pointed out that Mr Campbell's request had a specific time constraint, and that he was only seeking information that was held by the Council in relation to costings received in the autumn of 2008, as referred to in the communications from the Council at the time. The investigating officer highlighted that information about costings received at a later date would not be within the scope of his request.



21. In its response, the Council acknowledged that Mr Campbell's request was quite specific and it submitted that it should have given him notice that it did not hold any information in relation to quotes, costings or timings (relevant to parts (b), (c) and (d) of his request) from that time. The Council explained why it now considered that it held no information relevant to those parts of Mr Campbell's request. The Council also provided further background information to address additional points raised by Mr Campbell.
22. The relevant submissions received from both the Council and Mr Campbell will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

23. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Mr Campbell and the Council and is satisfied that no matter of relevance has been overlooked.

Handling in terms of the EIRs

24. In this case, the Council responded to Mr Campbell's information request solely in terms of the EIRs. In its submissions to the Commissioner, the Council confirmed that it did so having judged that the information requested was environmental information, as defined in the EIRs, and so exempt from disclosure in terms of section 39(2) of FOISA.
25. For this exemption to apply, the information under consideration must be environmental information as defined in regulation 2(1) of the EIRs. The relevant parts of that definition are reproduced in the Appendix to this decision.
26. In his application to the Commissioner, Mr Campbell argued that the information he had requested was not exclusively environmental and he disagreed that it was entirely exempt from disclosure in terms of section 39(2) of FOISA.
27. The previous Commissioner set out his thinking on the relationship between FOISA and the EIRs in detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland* and it need not be repeated here in full.



28. The Commissioner has taken note of Mr Campbell's concerns, but she agrees with the Council that the information under consideration in this case is environmental information. The information concerns details of repairs assessments (including the timescales, costings and quotes for carrying out such repairs) in relation to the Council's statutory notice procedure. Since the requested information relates to future building works and modifications to the built environment, the Commissioner considers it relates to measures likely to affect the state of the elements of the environment (including land and built structures), or factors (such as noise and waste) that affect or are likely to affect those elements. As such, she considers that the information requested by Mr Campbell is environmental information as defined in part (c) of the definition in regulation 2(1) of the EIRs.
29. In this case, therefore, the Commissioner accepts that the Council was entitled to apply the exemption in section 39(2) of FOISA to the withheld information, given her conclusion that it is properly considered to be environmental information.
30. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA.
31. For this reason, the Commissioner concludes that the Council complied with Part 1 of FOISA by applying the exemption in section 39(2) of FOISA to the information requested by Mr Campbell, and otherwise responding to his request in terms of the EIRs.

Does the Council hold the requested information?

32. The Council's response to Mr Campbell's request for review suggested that all of the information he had requested was held by the Council. However, when asked to consider the specific terms of Mr Campbell's request, the Council eventually conceded that it did not hold any of the information he had requested relating to quotes, costings and timescales for works that were held in November 2008. With regard to part (a) of his request, the Council submitted that the only information it held (in the autumn of 2008) regarding the 'scope of the works' was that contained in the Statutory Notice itself, a copy of which had already been provided to Mr Campbell.
33. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when an applicant's request is received.
34. In its submissions to the Commissioner, the Council accepted that the information it had disclosed in response to parts (b), (c) and (d) of Mr Campbell's request, did not, in fact, fall within the scope of his request. The Council acknowledged that the scope of Mr Campbell's initial request was very narrow, in that it was solely seeking information held by the Council in the autumn of 2008, and it now considered that it should have relied upon the exception provided for in regulation 10(4)(a) and advised Mr Campbell that it did not hold the information he was seeking in these parts of his request.



35. The Council also submitted that the 'scope of work' he had asked for in part (a) of his request was set out in the Statutory Notice itself, and that it had therefore disclosed that to Mr Campbell and that it was not withholding any information in relation to this part of his request.
36. In relation to the requested information relating to quotes, costings or timeframe, the Council explained that none were obtained in 2008 and therefore it did not hold this information. It provided detailed background information in relation to the works in question to explain why this was the case.
37. The Council explained that in September 2008 it sought an estimate for the work set out in the Statutory Notice by a named contractor. The contractor visited the site and, at a meeting on 10 September 2008, advised the Council that the works required to be undertaken were much greater than those set out in the Statutory Notice and that it was likely to cost in excess of £25,000. This amount is over the threshold for a minor term contract. The Council advised that no minutes of this meeting were contained in the project file, but they provided a copy of a contract progress sheet which confirmed the date when the meeting took place.
38. The Council explained that projects that cost in excess of £25,000 are procured through traditional tender and notes of interest are sought. In this case, notes of interest were received from five contractors in June 2009. The property was surveyed again in October 2009 and a further Statutory Notice was issued regarding additional repairs. The Council submitted that tender documents were then prepared, but prior to the issuing of the tenders one of the five proposed tenders ceased trading. The Council indicated that at this time the Council was preparing a framework agreement with 20 approved contractors for major works and it was decided to procure work under this new framework agreement. The Council submitted that this was considered to be in the best interests of the property owners as the tender would be prepared from 20 contractors rather than the four who had initially noted interest. The Council advised that unfortunately the tender process took much longer to finalise than anticipated and the lowest tender was not signed until March 2011.
39. The Council acknowledged that (given the time constraints of Mr Campbell's request) it should have advised him that it did not hold the information specifically related to costings, quotes and timescales from the autumn of 2008, as sought in parts (b), (c) and (d) of his request. It indicated that it had erred in this way as at the time it was trying to be helpful to Mr Campbell, and to provide him with maximum advice and assistance.
40. The Council was asked to explain the email sent to Mr Campbell on 27 November 2008, in which it was suggested to him that a surveyor would contact him with details of the costings/timeframe relating to the repairs. The Council was also asked to conduct searches for a specific contract number that had been given to Mr Campbell in relation to the repairs.



41. In its submissions, the Council noted that the contract number referred to by Mr Campbell is actually the project reference number which is unique to the repair detailed in the schedule of the Statutory Notice. The Council explained that this number is created on the 'visa' system and would have been created prior to the meeting with the initial contractor on 10 September 2008, and that it would remain the project number until the works have been concluded and invoices are raised. The Council submitted that this reference number does not relate to a particular contract associated with that repair.
42. The Council also advised that it had held meetings with two of the Council officers who had been in correspondence with Mr Campbell and both accepted that the use of the word 'contract' in the email of 27 November 2008 was misleading and the word 'project' would have been more appropriate. The Council referred to each of the officer's roles in the Council as further evidence to support its position that no quote was obtained in 2008 due to the repairs being estimated to cost above the £25,000 ceiling for minor term contracts. The Commissioner notes that the officer who emailed Mr Campbell on 27 November 2008 is a member of the repairs team which solely deals with repairs that cost less than £25,000, while the surveyor to whom he had forwarded the email was a member of contracts team which deals with all repairs likely to cost more than £25,000.
43. The Council noted that searches had been undertaken of staff emails and the file relating to the Statutory Notice (which contains all hard copy documents and print outs of electronic documents), and no evidence of any quotes, timescales or costings dating from the autumn of 2008 were discovered.
44. The Commissioner has carefully considered the submissions provided by both the Council and Mr Campbell. With respect to the scope of the works, the Commissioner is satisfied that the only relevant information the Council held on 27 November 2008 was that contained in the Statutory Notice which was provided to Mr Campbell. By providing this information, the Council complied with the EIRs.
45. With respect to the other parts of Mr Campbell's request, on balance, she accepts that the Council does not hold the relevant information. As such, the Council was entitled to refuse to supply this information on the basis that regulation 10(4)(a) of the EIRs was applicable, although it did not do so.
46. The Commissioner is disappointed with the time taken by the Council to recognise that the information provided to Mr Campbell was not what he had requested, and that the Council did not actually hold that information because of the way in which the project relating to the repairs had developed. The Council appears to have failed to grasp the fact that Mr Campbell was seeking information that was held by the Council from the autumn of 2008, while most of the information disclosed was created more than two years later. The Commissioner is concerned that the Council failed to identify this issue early on and that many months of investigation were required before the Council acknowledged that it had misinterpreted Mr Campbell's request.

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47. The Commissioner notes the Council's submission that its approach to the request was taken out of a desire to be helpful to Mr Campbell, and she acknowledges that providing him with up-to-date information regarding the Statutory Notice could be perceived as providing additional assistance and advice in line with the duty in Regulation 9 of the EIRs. Regulation 9 provides that a public authority shall provide advice and assistance, so far as it is reasonable to expect the authority to do so, to applicants and prospective applicants.
48. However, where an authority offers information other than that requested in a case where that information is not held, it should not give the impression that the information disclosed is actually what was requested. An authority should still make clear to an applicant where the information that has been requested is not actually held.
49. In this case, disclosing information about costings, etc. received at a later date might have been a helpful way to address Mr Campbell's request. However, by doing so without providing any associated explanation as to why the information disclosed was not that specified in the request, the Council caused dissatisfaction and confusion for Mr Campbell. For this reason, the Commissioner finds that the Council failed to comply fully with its duty to provide advice and assistance to Mr Campbell in this case.
50. The Commissioner considers that a more appropriate response, given the duty in regulation 9 of the EIRs, would have indicated that the information requested by Mr Campbell was not held, because of the history of the particular repairs as set out above. The Council's decision to supply the information about the later costings rather than those that Mr Campbell had understood were received in November 2008 would then have been understandable, and the Council would perhaps have avoided the need for the Commissioner to issue this decision.



DECISION

The Commissioner finds that the City of Edinburgh Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) when responding to the information request made by Mr Campbell's. She is satisfied that the information requested by Mr Campbell is entirely environmental information as defined in regulation 2(1) of the EIRs, and is exempt from disclosure in terms of section 39(2) of FOISA.

The Commissioner finds that the Council partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to Mr Campbell's information request.

She finds that the Council was correct to respond to all of the parts of Mr Campbell's information request as requests for environmental information made under the EIRs.

The Commissioner finds that by providing Mr Campbell with a copy of the Statutory Notice that sets out the scope of the required repairs it fulfilled part (a) of his information request and complied with the EIRs.

The Commissioner finds that the Council does not hold any information falling within the terms of parts (b), (c) and (d) of Mr Campbell's information request (and that it did not do so at the time when his request was received). However, by failing to make it clear that it did not hold the actual information sought, and why alternative information had been supplied instead, the Council failed to comply fully with its duty to provide advice and assistance under regulation 9(1) of the EIRs.

Since the content of this decision makes the position clear with respect to these parts of Mr Campbell's information request, the Commissioner does not require the Council to take any action in response to this failure.

Appeal

Should either Mr Campbell or the City of Edinburgh Council wish to appeal against this decision, there is an 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 notice.

Margaret Keyse
Head of Enforcement
10 July 2012



Appendix 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;
- (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;

...

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.

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.

...

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;
- ...