

Decision Notice

Decision 121/2015: Mr Alastair Tibbitt and City of Edinburgh Council

Consultancy contract: economic development of Edinburgh's East End

Reference No: 201500513

Decision Date: 28 July 2015



Scottish Information
Commissioner

Summary

On 15 January 2015, Mr Tibbitt asked City of Edinburgh Council (the Council) for information about a consultancy contract relating to the economic development of Edinburgh's East End.

The Council considered the request under the EIRs, and initially responded by providing some information and purporting to withhold the remainder on the basis that it was commercially confidential. Following a review, the Council changed its position and informed Mr Tibbitt that it did not hold the information. Mr Tibbitt remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had partially failed to respond to Mr Tibbitt's request for information in accordance with the EIRs. While she accepted that the Council did not hold the information requested, on its own interpretation of the request, the Commissioner found that this interpretation was too narrow and required the Council to give a further response to Mr Tibbitt in respect of the remaining information.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) and 2(b) (Duty to make available environmental information on request); 10(4)(a) (Exceptions from duty to make environmental information available)

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 15 January 2015, Mr Tibbitt made a request for information to the Council. The information requested related to the Council's contract with HG Consulting (Scotland) Limited (HG Consulting) concerning the economic development of Edinburgh's East End (St James). The request was in four parts and sought:
 - (i) Details of the brief given to the consultants and agreed scope of works documents.
 - (ii) Copies of any email correspondence between council officers and the consultants relating to the contract.
 - (iii) A timeline setting out when the work would be completed and details of the expected outputs.
 - (iv) Any outputs from the work received by the Council to date.
2. The Council acknowledged Mr Tibbitt's request, informing him that it would be considered under the EIRs. It responded on 12 February 2015, providing Mr Tibbitt with information in response to parts (i) and (iii) of his request, and informing him that the information requested in part (iv) was already publicly available on its website. In response to part (ii), the Council

notified Mr Tibbitt that it was withholding the information under regulation 10(5)(e) of the EIRs, as information it considered commercially confidential.

3. On 12 February 2015, Mr Tibbitt wrote to the Council requesting a review of its decision. He challenged the Council's decision to withhold information as commercially confidential. He indicated that he would be happy to receive the information in a redacted form.
4. The Council notified Mr Tibbitt of the outcome of its review on 13 March 2015. It apologised and informed Mr Tibbitt that regulation 10(5)(e) had been wrongly applied to the information requested in part (ii). The Council advised Mr Tibbitt that it was now relying on regulation 10(4)(a), as searches had led it to conclude that it did not hold any information falling within the scope of this part of his request.
5. On 14 March 2015, Mr Tibbitt wrote to the Commissioner's office, 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.
6. Mr Tibbitt stated he was dissatisfied with the outcome of the Council's review because:
 - (i) Although he had been provided with a "cursory outline" of the scope of work, no original documentation confirming the scope of work had been provided [part (i) of the request].
 - (ii) With regard to the Council's change of position at review stage, he did not accept that the Council held no email correspondence between its officers and HG Consulting [part (ii) of the request]. Mr Tibbitt again intimated that he would be happy to accept redacted information.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr Tibbitt 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. The case was allocated to an investigating officer.
8. On 23 March 2015, the Council was notified in writing that Mr Tibbitt had made a valid application.
9. The scope of the investigation was considered. Section 47(1)(a) of FOISA provides for an application to the Commissioner for a decision, by a person who is dissatisfied with the outcome of a public authority's review. (An application for a decision may also be made under section 47(1)(b), but only where the authority has failed to respond to a requirement for review: that does not arise here.) Section 47(2)(c)(ii) of FOISA requires that an application must specify the matter(s) raised by the applicant in seeking a review: it is clear to the Commissioner that the application must be confined to such matters.
10. As Mr Tibbitt identified no dissatisfaction with the Council's response to part (i) of his request when seeking a review, he was informed that the Commissioner was unable to investigate this matter. Consequently, this decision will consider the Council's response to part (ii) of

Mr Tibbitt's request only, as this was the only matter raised by him in his requirement for review.

11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was appraised of the scope of Mr Tibbitt's application, and was invited to comment. In particular, the Council was asked to explain the steps taken to identify and locate any information it held and which fell within the scope of part (ii) of the request. It provided submissions on this, and further communications followed on its interpretation of part (ii).

Commissioner's analysis and findings

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

Application of the EIRs

13. It is clear from the Council's correspondence with both Mr Tibbitt and the Commissioner that any information falling within the scope of this request would be environmental information, as defined in regulation 2(1) of the EIRs. Mr Tibbitt has asked for information relating to a consultancy contract concerning the economic development of a significant part of central Edinburgh. The Commissioner is satisfied that it would fall within either paragraph (a) of the definition of environmental information contained in regulation 2(1) (as information on the state of the elements of the environment, in particular land and landscape) or paragraph (c) of that definition (as information on measures, including plans and programmes, affecting or likely to affect those elements). Mr Tibbitt has not disputed this and the Commissioner will consider the information in what follows solely in terms of the EIRs.

Whether information held

Regulation 10(4)(a) (Information not held)

14. 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 the applicant's request is received.
15. The standard of proof in considering 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. She 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 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.
16. Part (ii) of Mr Tibbitt's request was for "email correspondence between Council officers and [HG Consulting] relating to this contract".

17. On 20 May 2015, the Council provided the Commissioner with its submissions on Mr Tibbitt's application. The Council apologised for the confusion between its initial response to Mr Tibbitt and its review outcome, explaining that it had erroneously considered letter correspondence (later given to Mr Tibbitt, in response to a separate request) in its original response. It acknowledged that there might have been an expectation that it would hold email correspondence with HG Consulting regarding the contract, but confirmed that none was actually held. In reaching this conclusion, it distinguished between email correspondence "relating to the contract" and email correspondence with HG Consulting "relating to the project (the economic development of central Edinburgh)": only the former, it submitted, fell within the scope of part (ii) of the request.
18. The Council explained that any email correspondence falling within the scope of part (ii) of Mr Tibbitt's request would have been held by its Chief Executive's Office or Legal Services. The Council described, and provided evidence of, the searches it had carried out. This included details of the locations searched and the key words used.
19. The Council confirmed that, following these searches, no information falling within the scope of part (ii) of Mr Tibbitt's request was identified. It provided screenshots by way of evidence.
20. Having considered the submissions from the Council, the Commissioner is satisfied (applying the interpretation placed on part (ii) of the request by the Council - see paragraph 17 above) that the Council took adequate, proportionate steps to establish what information it held and which fell within the scope of part (ii) of the request. She is satisfied that any relevant information would, if held, have been identified during the searches undertaken by the Council. On the balance of probabilities, therefore, the Commissioner is satisfied that the Council does not (and did not, on receiving the request) hold the information requested, assuming it was correct in limiting its interpretation of part (ii) in the way that it has.
21. The Commissioner has considered the Council's interpretation of the request carefully. It is apparent that this is limited to information relating specifically to the formal contract with HG Consulting) and the process of putting that contract in place. As indicated above, she is satisfied that the Council does not (and did not) hold such information, in the medium of email as specified in the request.
22. That interpretation does not address information (in the medium of email) relating to HG Consulting's performance of the contract, in other words the work the consultants carried out under the contract. On careful consideration, the Commissioner does not consider the distinction drawn by the Council to be a reasonable one to make in the circumstances.
23. A solicitor or other contract specialist might, in making specific reference to a "contract", be deemed to be focusing on the formal legal agreement for the performance of the work, rather than the work to be done by the contractor or consultant in fulfilment of it. There is no suggestion that Mr Tibbitt comes from such a specialist background and the Commissioner considers it far less likely that a lay person would readily draw the distinction made by the Council.
24. Indeed, reading the request as a whole, Mr Tibbitt's interest in this matter does appear to extend to the whole performance of the contract, including the outputs required by the Council. Reading part (ii) in that context, it does not appear to the Commissioner to be

reasonable to limit it to emails on the creation of a formal contract between the Council and HG Consulting.

25. It is clear from the Council's most recent submissions on this matter that it holds information, in the medium of email, on work carried out by HG Consulting under the contract. In the Commissioner's view, this information should have been considered by the Council in responding to part (ii) of the request. In failing to do so, it failed to comply with regulation 5(1) of the EIRs. She requires the Council to consider that information now and to give Mr Tibbitt a further response to his requirement for review, in relation to that information.

The public interest

26. The exception in regulation 10(4)(a) of FOISA is subject to the public interest test in regulation 10(1)(b) of the EIRs. In this case, in relation to information covered by the Council's interpretation of part (ii) of the request, the Commissioner is satisfied that no such information is held. Consequently, she accepts that there is no conceivable public interest in requiring the disclosure of such information and finds that the public interest in making information available is outweighed by that in maintaining the exception.

Decision

The Commissioner finds that City of Edinburgh Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Tibbitt.

The Commissioner finds that the Council (on its interpretation of part (ii) of the request) was correct to inform Mr Tibbitt, in terms of regulation 10(4)(a), that it did not hold the information requested.

However, the Commissioner also finds that the Council failed to comply with regulation 5(1) of the EIRs in interpreting part (ii) of the request too narrowly. She now requires it to carry out a further review, considering the information it holds (in the medium of email and otherwise falling within the scope of the request) on the work carried out by HG Consulting under the contract, and to provide Mr Tibbitt with a fresh review outcome (in terms of regulation 16 of the EIRs) in respect of that information. She requires the Council to do this by **11 September 2015**.

Appeal

Should either Mr Tibbitt or City of Edinburgh 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

28 July 2015

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;

...

(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.

...

10 Exceptions from duty to make environmental information available–

...

(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;

...

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