

Decision Notice

Decision 111/2019: Mr X and City of Edinburgh Council

Meadowbank Stadium site

Reference No: 201900081

Decision Date: 2 August 2019



Scottish Information
Commissioner

Summary

The Council was asked for information about the Meadowbank Stadium site. The Council provided some information, while stating that other information was not held.

An application was made to the Commissioner, questioning whether the Council held more information. The Commissioner was satisfied that the Council had carried out appropriate searches and disclosed all the information it held.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (c) of definition of "environmental information") (Interpretation); 5(1) (Duty to make available environmental information on request); 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 17 October 2018, Mr X made a request for information to City of Edinburgh Council (the Council). The information requested was:
... details of all correspondence and meetings, from 01/12/2013 to the present day, concerning any part of the Meadowbank Stadium site (including the sports centre, velodrome, car park and landscaped areas) with [named individual] or anyone who works with or for [named company].
It should cover all meetings, including those held by Councillors, Council Officials or anyone representing the City of Edinburgh Council at such a meeting. It should also include dates, times, agendas, attendee lists, notes, minutes, emails and any other correspondence.
2. The Council responded on 13 November 2018 and advised Mr X that it had considered his request under the EIRs. It provided some information to Mr X, with explanation of some of the context. It advised that personal data had been redacted under regulations 10(3) and 11(2) of the EIRs. It confirmed that it held no further information, while explaining what had been discussed at a particular meeting for which no records were held.
3. On 22 November 2018, Mr X wrote to the Council, requesting a review of its decision on the basis he believed further information should be held. He provided reasons for this.
4. The Council notified Mr X of the outcome of its review on 21 December 2018. It apologised that the initial response had not made reference to any information held regarding meetings or correspondence with City of Edinburgh Councillors.
5. The Council explained that the Commissioner had drawn a distinction between when Councillors were carrying out their role as constituency representatives and any Council role the Councillors might hold. It advised that information was not considered within the scope

of FOI legislation when Councillors were carrying out their role as constituency representatives.

6. The Council confirmed that it had checked whether the Councillors who were office bearers during the period of the request held any information. It confirmed that no such information was held and, to confirm this, applied regulation 10(4)(a) of the EIRs.
7. The Council advised that the information regarding the meeting referred to in paragraph 2 had been provided by way of advice and assistance under regulation 9 of the EIRs. It provided further explanation of the capacity in which the named individual had communicated with the Council and otherwise upheld its original decision.
8. On 15 January 2019, Mr X wrote to the Commissioner's office. 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 X's application reflected his dissatisfaction that the Council had not provided him with all of the information it held and which fell within the scope of his request.
9. Mr X also disputed whether information about meetings or communications with a person who did not reside in a Councillor's constituency could be classed as constituency information and therefore not covered by FOI legislation.

Investigation

10. The application was accepted as valid. The Commissioner confirmed that Mr X made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
11. On 31 January 2019, the Council was notified in writing that Mr X 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 to answer specific questions, focusing on the steps taken to identify and locate any relevant information.

Commissioner's analysis and findings

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

Application of the EIRs

14. It is clear from the Council's correspondence with both Mr X and the Commissioner that the information sought by Mr X is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. It relates to the redevelopment of the Meadowbank Stadium site, and so the Commissioner is satisfied that it falls within either paragraph (a) or paragraph (c) of the definition in regulation 2(1) (the text of each paragraph is reproduced in Appendix 1). Mr X has not disputed this and the Commissioner will consider the information in what follows solely in terms of the EIRs.

Information held by the Council

15. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. While this duty is subject to certain qualifications, none of them appear to be relevant in this case. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request, as opposed to information an applicant believes the authority should hold (but which is not in fact held at that time).
16. Under the EIRs, a public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available. If no such information is held by the authority, regulation 10(4)(a) of the EIRs permits the authority to give the applicant notice to that effect.
17. In this case, the Council submitted that it had provided Mr X with any information it held in relation to correspondence with the named individual. It submitted, however, that it held no information relating to the named individual, or any other person in connection with the named company.
18. In his application to the Commissioner, Mr X questioned whether information held by a Councillor regarding meetings or correspondence with someone who was not a constituent would be considered as not held for the purposes of the FOI legislation. This is not a distinction the Commissioner would recognise: if the information related to the Councillor's constituency business (which it might still do if it involved a non-constituent), as opposed to the business of the Council, it would be held by (or on behalf of) the Councillor and not the Council. Only information relating to the Councillor discharging a Council office, or otherwise performing the business of the Council, could be regarded as falling within the scope of this request.
19. The Council provided full submissions on the steps taken to identify and locate the information requested by Mr X. The Council confirmed the searches and enquiries it undertook to ascertain whether it held any further information falling within the scope of Mr X's request, detailing the places searched. This included consultation with Councillors and relevant staff. Relevant retention policies were referred to. The conclusion of these searches and enquiries was that no information was held, other than that provided to Mr X. The Council provided evidence to this effect.
20. Having considered all relevant submissions and the terms of Mr X's request, the Commissioner accepts that the Council took adequate, proportionate steps to establish whether it held any information falling within the scope of those parts of Mr X's request covered by his application to the Commissioner.
21. As mentioned above, the Commissioner can only consider whether information is actually held by the Council, not what information it should hold or what an applicant believes it should hold.
22. In all the circumstances, therefore, the Commissioner is satisfied that the Council does not (and did not, at the time it received the request from Mr X) hold any information which was subject to Mr X's request for review and application to the Commissioner. If the Council did hold any further relevant information, the Commissioner is satisfied that it would have been found by the searches carried out.

23. The exception in regulation 10(4)(a) is subject to the public interest test in regulation 10(1)(b) of the EIRs and can only be upheld if, in all the circumstances, the public interest in maintaining the exception outweighs the public interest in making the information available. The Commissioner is satisfied that the Council does not (and did not, on receiving the request) hold the information in question. Consequently, he does not consider there to be any conceivable public interest in requiring that the information be made available. The Commissioner therefore concludes that the public interest in making the requested information available is outweighed by that in maintaining the exception in regulation 10(4)(a) of the EIRs.
24. The Commissioner is satisfied, therefore, that the Council, having provided the information it held in connection with the named individual, was entitled to inform Mr X, under regulation 10(4)(a) of the EIRs, that it did not hold the information that was subject to his requirement for review.

Decision

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

Appeal

Should either Mr X or the Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Margaret Keyse
Head of Enforcement

2 August 2019

Appendix 1 Relevant statutory provisions

Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

-

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

...

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

...

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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