



Scottish Information
Commissioner

**045/2008 Dr Alex Morrow and City of Edinburgh
Council**

Information relating to a planning application

**Applicant: Dr Alex Morrow
Authority: City of Edinburgh Council
Case Nos: 200700255, 200700600
Decision Date: 31 March 2008**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 045/2008 Dr Alex Morrow and City of Edinburgh Council

Request for information relating to a planning application

Relevant Statutory Provisions and Other Sources

Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations: 2 (Interpretation) (definition of "environmental information"); 5(1) and (2)(a) (Duty to make available environmental information on request); 6(1)(b) (Form and format of information) and 16(4) (Review by Scottish public authority)

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement); 2(1) and (2)(a) (Effect of exemptions) and 39(2) (Health, safety and the environment)

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Dr Alex Morrow (Dr Morrow) requested, in three separate but related requests, information relating to his planning application from the City of Edinburgh Council (the Council). In responding to Dr Morrow's first request the Council cited regulation 6(1)(b) of the EIRs, stating that the information sought was available online. The Council's initial response to his second request also stated that the information he sought was exempt in terms of 10(4)(d) and (e) of the EIRs. In response to his third request, Dr Morrow received a general response from the Council which did not specifically address the points in his request. Dr Morrow was not satisfied with these responses and asked the Council to review its decisions. The Council carried out reviews and, as a result, acknowledged in respect of his first request that some information was missing from the online file, but that it had now rectified this. In respect of his second request, the Council acknowledged that it had erroneously referred to regulations 10(4)(d) and (e) and supplied Dr Morrow with the information sought. In responding to his third request the Council acknowledged that its initial response did not specifically address the questions raised in his third request. The Council then went on to provide a response to each of Dr Morrow's queries. Dr Morrow remained dissatisfied with the responses from the Council and applied to the Commissioner for a decision.



Following an investigation, the Commissioner found that the Council had fully complied with the EIRs in relation to request 3. However, the Council had failed to respond within the relevant timescales with regard to both request 1 and request 2. The Commissioner did not require the Council to take any action.

Background

1. This decision deals with three separate but related requests for information.

Request 1

2. On 18 September 2006, Dr Morrow wrote to the Council requesting details of all discussions that took place concerning his planning application, including copies of all hand written notes, e-mails, minutes of discussions and reports alongside copies of external correspondence including letters of objection and support which the planning department received in relation to this application and details of when the file was consulted and by whom [**request 1**]. This request was sent by recorded delivery and Dr Morrow was able to demonstrate (and the Council accepted in correspondence dated 27 January 2007) that this letter was received by the Council on 20 September 2006.
3. No response was received and Dr Morrow sent a reminder by email on 21 October 2006, which referred to, but did not include a copy of, the request of 18 September.
4. On 24 October 2006, the Council wrote to Dr Morrow in response to this reminder, but without access to the request of 18 September. The Council sought to respond with reference to other correspondence from Dr Morrow, providing Dr Morrow with details as to how to access documents relating to his planning application and providing him with a link to guidelines and the Local Plan relating to the area in question. The Council informed Dr Morrow that his request had been handled in terms of the EIRs, and that regulation 6(1)(b) of the EIRs permitted the Council to direct him to these sources of information. However, the Council also provided Dr Morrow with copies of e-mails which contained exchanges between his local councillor and planning officials in relation to his planning application. The Council noted that the request of 18 September appeared not to have reached the relevant staff, and offered assistance should its response not address all the points it had raised.
5. Dr Morrow wrote again to the Council on 30 October 2006 to request a review of its handling of his request, this time attaching a copy of initial request. He noted that the web links and documents supplied did not provide the information sought in his letter of 18 September.



6. On 8 November 2006, Dr Morrow received a further letter bearing the reference number allocated to request 2 (described below), but which appeared to be a second response to request 1. In this response, the Council explained that the information requested was exempt under FOISA as it fell under the terms of the EIRs. The Council then directed Dr Morrow to the Council's Planning and Building Control Portal (the Planning Portal) and stated that there is no paper file for the relevant planning application and that it had ascertained that there was no other history of the property retained in paper format. Dr Morrow responded to this letter on 9 November, again seeking a review.
7. The Council responded to Dr Morrow's request(s) for review (that of 30 October being the relevant one for the purposes of this decision) by letter dated 6 December. The Council confirmed that all the information which the Council held in relation to his planning application was available on the Planning Portal. The Council provided Dr Morrow with details as to how to access the relevant planning file online and stated that these alternative means of accessing information are referred to in the Council's publication scheme and are also covered by regulation 6(1)(b) of the EIRs. The Council also advised Dr Morrow that it did not hold information revealing who had accessed the file and when.

Request 2

8. On 30 October 2006, Dr Morrow requested information concerning a Development Quality Sub-Committee Delegated Application Report, and specifically when this report was created and, if amended, when these amendments were carried out [**request 2**].
9. As noted above, a letter was sent on 8 November bearing the request reference allocated to this request, but apparently addressing request 1. Dr Morrow responded by pointing out that two requests had been made and that there appeared to be some confusion. Dr Morrow wrote to the Council again on 29 November 2006, asking when a response would be provided to request 2, and noting that this information had not been supplied and that no explanation of why it had been withheld had been given.
10. The Council provided a response to request 2, again in terms of the EIRs on 1 December 2006. The Council cited the exceptions in regulations 10(4)(d) and 10(4)(e) of the EIRs and withheld the information requested.
11. On 8 December 2006, Dr Morrow wrote to the Council requesting a review of its decision. He expressed dissatisfaction with the Council's application of regulations 10(4)(d) and (e) to the information.



12. In its response, dated 12 January 2007, the Council provided Dr Morrow with the requested metadata showing when the document was accessed and/or amended and apologised that he was initially incorrectly informed that the information was exempt.

Request 3

13. On 5 January 2007, Dr Morrow made a further request for all discussions either oral or in writing which took place between Council officials and three named parties or anyone representing these parties. Dr Morrow also queried whether declarations relating to conflicts of interest were obtained from the Council officials dealing with his planning application [**request 3**].
14. The Council failed to provide a clear response to Dr Morrow's request 3. A letter dated 23 January 2007 did comment on some of the matters raised along with other issues, but made no direct reference to request 3.
15. Dr Morrow wrote to request a review on 15 March 2007. He noted that he was dissatisfied with the Council's apparent failure to respond to request 3.
16. The Council's response to this request for review, dated 10 April 2007, referred Dr Morrow to the letter dated 23 January 2007, but acknowledged that it addressed his queries more generally and did not specifically state that it was a response to his request. The Council then went on to specifically address each of Dr Morrow's requests.
17. On 20 February 2007 and 17 April 2007, Dr Morrow made two applications for decision by me. The first concerned requests 1 and 2, and the second concerned request 3.
18. The applications were validated by establishing that Dr Morrow had made his requests for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its responses to each request. The two cases were conjoined for the purposes of investigation and this decision, and they were allocated to an investigating officer.

The Investigation

19. On 8 May 2007, the Council was notified in writing in terms of section 49(3)(a) of FOISA (which, as a result of regulation 17 of the EIRs, covers applications made to me under both the EIRs and FOISA) that applications had been received from Dr Morrow and was asked to provide my Office with specified items of information required for the purposes of the investigation.



20. During the investigation, various submissions were received from both the Council and Dr Morrow. Key aspects of these submissions are summarised in the paragraphs below. All relevant submissions received in relation to this case were fully considered during the investigation.

Information sought from the Council

21. In light of the areas of dissatisfaction raised by Dr Morrow, the Investigating Officer sought a range of information from the Council. This information included:
- a) A response from the Council in relation to the various issues raised in Dr Morrow's applications;
 - b) A detailed description of all work undertaken by the Council to ensure that it held no additional information falling within the scope of Dr Morrow's request 1 which was not available within the online planning file;
 - c) Confirmation of whether any documentation sought by Dr Morrow had been deleted or destroyed from the Council files at any point;
 - d) A content management report detailing when documents relating to Dr Morrow's planning application was uploaded onto the planning Portal;
 - e) Further information as to the chronology of Dr Morrow's request alongside an explanation of the manner in which his request was dealt with.

The Commissioner's Analysis and Findings

FOISA or the EIRs?

22. Having considered the information that would satisfy Dr Morrow's requests, it is my opinion that the Council was correct in its conclusion that it is environmental information. Information relating to planning applications will commonly fall under the definition of environmental information contained in regulation 2 of the EIRs (reproduced in full in the appendix to this decision), given that that information will, in most circumstances, explicitly relate to plans and developments which will have a direct impact on the land use and landscape of a particular area.
23. Where a person requests environmental information, they have dual rights of access under the general rights provided by FOISA and also under the specific rights contained in the EIRs.



24. In the circumstances of this case, I have taken the Council's handling of the requests solely in terms of the EIRs to mean that it would wish to rely upon the exemption in section 39(2) of FOISA with respect to this information. This technical exemption provides that information that is environmental information for the purposes of regulation 2 of the EIRs is exempt information under FOISA (thereby allowing any information held to be considered solely in terms of the EIRs).
25. This exemption is subject to the public interest test in section 2(1)(b) of FOISA. My view is that, as there is a separate statutory right of access to environmental information, the public interest in maintaining this exemption and allowing access in line with the requirements of the EIRs outweighs the public interest in the disclosure of information under FOISA.
26. As I accept that the information requested by Dr Morrow is environmental information, and properly considered exempt under section 39(2) of FOISA, I have concluded that the Council acted appropriately by considering the information relevant to Dr Morrow's requests in terms of the EIRs.
27. In what follows, I have made my decision in this case solely under the terms of the EIRs. While technical issues addressed below could also be addressed in terms of the parallel provisions within FOISA, I have restricted my consideration to the relevant provisions of the EIRs to avoid duplication.

Request 1

28. In his application to my Office, Dr Morrow expressed his dissatisfaction with the response received from the Council. He was specifically concerned that he had not been provided with all the information that fell within the scope of his request and was dissatisfied with the manner in which his request was dealt with.
29. In response to this request for various documents relating to Dr Morrow's planning application, the Council relied on regulation 6(1)(b) of the EIRs. Regulation 6(1)(b) provides that Scottish public authorities are not obliged to comply with requests in circumstances where the information is already publicly available and easily accessible to the applicant in a form or format other than that requested.
30. The Council also supplied Dr Morrow with copies of the Development Quality Sub-Committee Delegated Application Report on the planning application and e-mailed correspondence between his local councillor and planning officials relating to his application, neither of which appeared in the online planning file at that time. I have noted that all but one of the emails were created after the date of receiving Dr Morrow's information request, and so these (other than the email supplied dated 14 September 2006) did not require to be considered in responding to this request.



31. In a previous decision (074/2007 Dr L and the City of Edinburgh Council), I have commented that where an authority receives a request under the EIRs (or indeed FOISA) it will only be appropriate to rely on the planning file as a definitive source of information in relation to an application in circumstances where the Council is entirely confident that all the information received and recorded by its officers relating to that application is copied to the relevant file.
32. Although the Council referred him to the electronic Planning and Building Control Portal, Dr Morrow remained dissatisfied on the basis that he believed that not all of the information relating to his application had been made available on the Portal.
33. The Council's submissions to my Office explained that the planning application file for Dr Morrow's application is an electronic record and there was no paper file and therefore no further information falling within the scope of request 1 was held other than that supplied or available via the Planning Portal. The Council stated that there were no meetings or discussions regarding Dr Morrow's planning application. The Council explained that planning case officers work with a high degree of independence on minor applications and it is only where there are requests for amendments that meetings are held with applicants or agents.
34. However, the Council acknowledged that at the time of Dr Morrow's initial request the delegated report in relation to his planning application was not available through its website, and advised me that this had since been made available (following receipt of Dr Morrow's request for review).
35. Following these submissions, the investigating officer sought comment from the Council to clarify the position concerning the email correspondence relating to Dr Morrow's planning application, which had been supplied to him and my Office, but which did not appear on the Planning and Building Standards Portal. The purpose of this further request was to establish whether further information which is not available to the public might be held in relation to the specified planning application.
36. In response the Council explained that some correspondence was placed on the Council's Planning and Building Standards Portal after its decision concerning the relevant planning application was made. The Council stated that objections had been received to this being made public and so its status on the underlying database was changed to 'sensitive' making it no longer visible to the general public, but still accessible by planning staff.



37. The Council also highlighted that the UK Information Commissioner suggested that for reasons of data protection certain features of planning related correspondence should not be placed in public view. The Council acknowledged that the warning notice provided on its website should be amended to take account of these developments.
38. The Council supplied a screen print which showed the items currently on the Council's operating system used to manage electronic documents. The screen print supplied shows all the information held and the date it was uploaded.
39. From this document and the material accessible on the Council's Planning and Building Standards Portal, it is apparent that the Development Quality Sub-Committee Delegated Application Report was published on the Council's website following its initial response to Dr Morrow and before the Council responded to his request for review. It was not available online at the time of Dr Morrow's request, but the Council supplied a copy rather than rely upon regulation 6(1)(b) in order to claim that it was already available to Dr Morrow. In this respect, the Council acted in accordance with the EIRs. Similarly, although the email exchanges referred to above are no longer publicly available, they were supplied to Dr Morrow in response to his request, and so the Council did not seek to apply the provisions of regulation 6(1)(b) to these.
40. I note that a number of other items have since appeared on the Council's Planning and Building Standards Portal. However, I am limited to the consideration of the information held by the Council at the time of Dr Morrow's request, and which falls within the scope of Dr Morrow's request. Documents created and submitted after Dr Morrow's request cannot form part of this investigation.
41. Given the Council's explanation of the decision making process with respect to planning applications, and the information supplied to me in the course of my investigation, I am satisfied that the Council has now identified and published or supplied Dr Morrow with all the relevant information concerning his planning application which was held at the time of request 1.
42. Having considered all the details provided above, I am satisfied that the Council was correct in its application of regulation 6(1)(b) in its response to request 1. Although, the Council has admitted to my Office that elements of Dr Morrow's case file are not available via the publicly accessible website, I am satisfied that the Council has taken reasonable steps to ensure Dr Morrow now has access to the documents that fall within the scope of his request. The technical aspects of this request will be discussed below.



Request 2

43. In request 2, Dr Morrow sought information concerning the Development Quality Sub-Committee Delegated Application Report, and specifically details of when this report was created and, if amended, when these amendments were carried out.
44. In his application to my Office Dr Morrow was dissatisfied that he had not been provided with original query criteria to ensure that the Council's searches covered all records. He also queried whether the information provided had been altered following a specific date. Details of the original search criteria did not form part of Dr Morrow's original request and therefore fall outwith the scope of this investigation. However, the concerns raised by Dr Morrow with respect to the adequacy of the searches carried out by the Council, remain within the scope of this investigation.
45. After initially misinforming Dr Morrow that the information he sought in relation to request 2 was exempt in terms of regulations 10(d) and (e) of the EIRs, and following clarification of his request, the Council supplied Dr Morrow with the metadata showing when the report in question was accessed and/or amended. The Council also apologised for incorrectly informing Dr Morrow that the information was exempt.
46. In its response, the Council highlighted to Dr Morrow that the report was not compiled using standard word processing software. The Council stated that the software used allows a number of different variables/documents to be pulled together in one completed document. The Council also advised that it is not possible to see what changes were made at any given time as the documents are not saved as different versions and only the last formally approved Report is relevant.
47. Despite initially misinterpreting Dr Morrow's request, I am satisfied, having considered the explanations provided, that the Council provided Dr Morrow with a full response to request 2, in line with the requirements of regulation 5(1) of the EIRs, following its internal review of the handling of this request. The technical aspects of this request will be discussed below.

Request 3

48. In request 3, Dr Morrow sought details of specific discussions between named individuals and Council officials. He also asked if any declarations of interest were obtained from the Council officials dealing with his application. Dr Morrow subsequently requested a review in the belief that no response had been provided within the statutory timescales.



49. The Council, in its response to Dr Morrow's request for review, referred him to an earlier letter dated 23 January 2007. In this letter, the Council dealt generally with the concerns raised by Dr Morrow about his planning application. With regard to Dr Morrow's concerns of conflicts of interest, the Council informed him that Planning staff carefully guard their independence and a protocol, agreed when the Council was established, sets out a code of practice to ensure that this is maintained. The Council went on to state that there is a code of conduct for Council employees and procedures to avoid a conflict of interest on planning applications. As noted above, however, this letter did not clearly indicate that it was intended as a response to Dr Morrow's request 3.
50. The Council's review response provided specific responses to Dr Morrow's requests, stating that, to the best of their recollection, none of the three different members of staff had any conversations with the named individuals specified by Dr Morrow. In addition, the Council stated that there had been no declarations of interest from any of the staff and this would not have been requested. The Council submitted that all planners operate under the professional code of conduct as required by the Royal Town Planning Institute and that all three members of staff were corporate members. Where there is a conflict of interest, officers independently declare this.
51. In its submissions to my Office the Council explained that there were no substantive exchanges between officials and the named individuals other than a standard acknowledgement to representations, whilst the planning application was being considered. In its response to Dr Morrow, the Council also highlighted that it would not enter into discussion on the merit of cases with third parties, as per its Development Control Charter. The Council further explained that if there has been an exchange which was recorded it would have been held with all the other planning material.
52. With regard to the second element of this request, the Council explained that where applicants or third parties are known to planning officials, and there is a potential conflict of interest, Council guidelines require the official(s) to notify this to the Head of Planning. This declaration is then appended to the case file which is referred to the Council's Monitoring Officer.
53. Again, despite the initial confusion relating to the handling of Dr Morrow's request, which will be considered later in this decision, I am satisfied that the Council have now supplied Dr Morrow with all the information relevant to his third request and sufficient explanation that would indicate that all discussion would be held and recorded in the relevant planning file. I am therefore satisfied that in so doing, the Council acted in accordance with regulation 5(1) of the EIRs.



Technical breaches

54. Dr Morrow also raised a particular concern with the manner in which the Council dealt with his requests and in particular that the Council exceeded the statutory timescales for responding to his requests and requests for review.
55. Regulation 5(2)(a) requires that a Scottish public authority must comply with a request for environmental information as soon as possible and in any event no later than 20 working days, subject to regulations 6 and 12.
56. Similarly, regulation 16(4) provides that a Scottish public authority shall, as soon as possible, and no later than 20 working days after the date of receipt of representations, notify the applicant of its review decision.

Request 1

57. Dr Morrow submitted request 1 by recorded delivery to the Council on 18 September 2006, and was able to provide proof to the Council showing that this was delivered on 20 September 2006. Following a reminder e-mail sent on 21 October 2006, the Council supplied Dr Morrow with a response to his first request on 24 October 2006. In this letter the Council stated that his original letter of 18 September 2006 had not reached the relevant staff.
58. In a letter dated 23 January 2007, the Council acknowledged that the letter of the 18 September 2006 did reach the Council and could not offer a further explanation of the failure in the mailing system but emphasised that this was a rare occurrence.
59. I am satisfied that the Council failed to respond to Dr Morrow's request 1 within the relevant timescales set out in regulation 5(2)(a).
60. Dr Morrow submitted his request for review in relation to request 1 on 30 October 2006. This was acknowledged by the Council on the same day. The Council formulated a response on 6 December 2006, but which, according to Dr Morrow, he did not receive until 9 January 2007 (when it was forwarded to him as an attachment to an email). On the basis of the date that the Council's response was formulated alone, I am satisfied that the Council failed to respond with the relevant time set out in regulation 16(4) in responding to request 1.

Request 2

61. Dr Morrow submitted request 2 on 30 October 2006. After some confusion, the Council provided Dr Morrow with a substantive response to his request on 1 December 2006. Again, this response fell outwith the relevant timescales set out in regulation 5(2)(a).



62. Dr Morrow then submitted a request for review in relation to this request on 8 December 2006, and a response was issued to Dr Morrow on 12 January 2007. This response also falls outwith the relevant timescales set out in regulation 16(4).

Decision

I find 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 Dr Morrow.

I find that the Council acted in accordance with the EIRs in responding to request 3.

I also find that the Council was correct in its application of regulation 6(1)(b) in responding to request 1.

However, in failing to respond to Dr Morrow within the relevant timescales in respect of request 1 and 2, the Council failed to comply with regulation 5(2)(a) and 16(4) of the EIRs. I do not require the Council to take any action in response to these failures.

Appeal

Should either Dr Morrow or the 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.

Signed on behalf of Kevin Dunion, Scottish Information Commissioner, under delegated authority granted on 14 November 2007.

Margaret Keyse
Head of Investigations
31 March 2008



Appendix

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;
- (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;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (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);

[...]



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.

[...]

6 Form and format of information

- (1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-

[...]

- (b) the information is already publicly available and easily accessible to the applicant in another form or format.

[...]

16 Review by Scottish public authority

[...]

- (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.

[...]



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.

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 –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - (a) section 25;

[...]

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.