

Decision Notice

Decision 003/2017: Mr David Telford and North Ayrshire Council

Whether requests were manifestly unreasonable

Reference No: 201601710

Decision Date: 5 January 2017



Scottish Information
Commissioner

Summary

On 6 July 2016, North Ayrshire Council was asked for information concerning a cost plan and cost reports for a housing development in Fairlie, covered by a Section 75 Agreement.

The Council initially considered the request under FOISA, stating it considered parts of it to be a repeat of a previous request and that, as a result, it was not obliged to respond. At review, the Council changed its position and considered the request under the EIRs, stating it considered parts of it to be manifestly unreasonable.

The Commissioner did not support the Council's view. She found that the Council had failed to demonstrate that the request was manifestly unreasonable and required it to issue a revised review response otherwise than in terms of regulation 10(4)(b) of the EIRs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 14 (Vexatious or repeated requests); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definitions (a), (c) and (e) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2) and (4)(b) (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 6 July 2016, Mr Telford made a six-part request for information to North Ayrshire Council (the Council) concerning Policy RES3 of the current North Ayrshire Council Local Development Plan. This included the following:
 - Part 1: It is noted that the cost plan contained within the Section 75 Agreement registered with the Registers of Scotland is simply a blank template. Please provide details of the actual completed cost plan that is relied on by the parties to this agreement. If such detail is still currently not available, please provide the information that describes the logic behind such an omission and when full cost plan details will be available. It is noted that cost plan details were originally available and published on the Council's Planning website. Please advise if this original cost plan has been superseded or is still a live document.
 - Part 5: Please provide full details of any or all of the various cost reports listed and required by the Section 75 Agreement that may have currently been prepared and presented to either the RES3 Trust or to the Council.

The full text of Mr Telford's request is reproduced in Appendix 2 to this decision. The Appendix forms part of the decision.

2. The Council responded on 4 August 2016. For parts 1 and 5, it informed Mr Telford that no new information was held. The Council further stated that, as it had already supplied information on this matter, it was not obliged to comply with these parts of his request as these were repeated requests in terms of section 14(1) of FOISA (n.b. the Council is understood to have been relying on section 14(2) of FOISA, which concerns repeated requests, rather than section 14(1), which concerns vexatious requests).
3. On 5 August 2016, Mr Telford wrote to the Council, requesting a review of its decision on the basis that it had failed to provide the information requested. Noting that Policy RES3 was a constantly evolving entity, Mr Telford argued that information that was relevant at one time could differ, or be superseded by updated information at a later date.
4. The Council notified Mr Telford of the outcome of its review on 2 September 2016, upholding its original decision with modification. It informed Mr Telford that it ought to have considered his request under the EIRs and, while it upheld its original decision to refuse these parts of his request under section 14(1) of FOISA, it acknowledged that it should have notified him in terms of regulation 10(4)(b) of the EIRs that his request was manifestly unreasonable.
5. On 18 September 2016, Mr Telford wrote to the Commissioner, 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. Mr Telford stated he was dissatisfied with the outcome of the Council's review because it had failed to address virtually all of the information requested.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Telford 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.
7. On 27 September 2016, the Council was notified in writing that Mr Telford had made a valid application. The case was then allocated to an investigating officer.
8. 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 answer specific questions, with particular reference to its claim that it considered parts 1 and 5 of Mr Telford's request to be manifestly unreasonable.
9. Mr Telford was also invited to comment on why he believed it was in the public interest for the information to be disclosed.

Commissioner's analysis and findings

10. 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 Telford and the Council. She is satisfied that no matter of relevance has been overlooked.

Background to request

11. In its submissions to the Commissioner, the Council explained that Policy RES3 formed part of the Council's Local Development Plan for Fairlie. It is a site-specific policy for Kelburn Castle, Fairlie, providing for a housing development and a subsequent programme of restoration and maintenance for Kelburn Castle and improvements to the Country Centre in Fairlie.

12. The Council explained that Condition 2 of Policy RES3 required the submission of a detailed, fully verifiable, financial and business plan for the overall development showing that all funds raised from the sale and development (with the exception of a reasonable developer's profit) are to be channelled into the conservation and subsequent maintenance of Kelburn Castle and the enhancement of Kelburn Country Centre to secure their ongoing use.

FOISA or the EIRs?

13. The relationship between FOISA and the EIRs was considered at length in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹. Broadly, in the light of that decision, the Commissioner's general position is as follows:
- (i) The definition of what constitutes environmental information should not be viewed narrowly.
 - (ii) There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
 - (iii) Any request for environmental information therefore **must** be dealt with under the EIRs.
 - (iv) In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
 - (v) If the authority does not choose to claim the section 39(2) exemption, it must respond to the request fully under FOISA, by providing the information, withholding it under another exemption in Part 2, or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these).
 - (vi) Where the Commissioner considers a request for environmental information has not been dealt with under the EIRs she is entitled (and indeed obliged) to consider how it should have been dealt with under that regime.
14. As the Commissioner had not had sight of the withheld information in this case, she asked the Council to explain the basis upon which it considered the information to be environmental, as indicated in its review outcome. In response, the Council stated that, as the matter affected the environment due to the planning application and planning policy, it was appropriate to consider the request under the EIRs.
15. The Commissioner is satisfied, from the wording of Mr Telford's request and the Council's submissions, that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs. The information in question concerns costings required by a Section 75 Agreement relating to a proposed housing development and, as such, the Commissioner is satisfied that it would fall within paragraphs (a), (c) and (e) of the definition of environmental information in regulation 2(1) of the EIRs (reproduced in Appendix 1 to this decision).

Section 39(2) of FOISA

16. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>

17. In its submissions to the Commissioner, the Council stated that all of the information fell to be considered in terms of the EIRs and therefore it wished to rely on section 39(2) of FOISA as the information was “environmental information”.
18. The Commissioner accepts that, in this case, the Council was entitled to apply the exemption in section 39(2) of FOISA to the information requested, given her conclusion that it is properly considered to be environmental information.
19. 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.
20. Mr Telford has not disputed the Council’s decision, at review stage, to handle the request under the EIRs and the Commissioner will consider the information in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs

21. Regulation 5(1) of the EIRs, subject to the various qualifications contained in regulations 6 to 12 (regulation 5(2)(b)), requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.
22. A Scottish public authority applying any of the exceptions under regulation 10 of the EIRs must interpret them in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
23. In this case, the Council confirmed to the Commissioner that it wished to rely upon regulation 10(4)(b) of the EIRs in respect of the information sought in parts 1 and 5 of Mr Telford’s request.

Regulation 10(4)(b) of the EIRs

24. Regulation 10(4)(b) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that the request for information is manifestly unreasonable.
25. There is no definition of “manifestly unreasonable” in the EIRs, or in Directive 2003/4/EC from which they are derived. The Commissioner’s general approach is that the following factors will be relevant to determining whether a request (which may be the latest in a series of requests or other related correspondence) is manifestly unreasonable. These are that:
 - (i) It would impose a significant burden on the public authority.
 - (ii) It does not have a serious purpose or value.
 - (iii) It is designed to cause disruption or annoyance to the public authority.
 - (iv) It has the effect of harassing the public authority.
 - (v) It would otherwise, in the opinion of a reasonable person, be considered to be manifestly unreasonable or disproportionate.

This list is not exhaustive and, depending on the circumstances of the case, and provided the impact on the authority can be evidenced, other factors may be relevant.

26. The Commissioner acknowledges that each request must be considered on the merits of the case, supported by evidence, clear evaluation and reasoning. The term "manifestly unreasonable" must be applied to the request and not the requester, but an applicant's identity, and the history of their dealings with a public authority, may be relevant in considering the nature and effect of the request and surrounding circumstances.

The Council's submissions

27. In its review response to Mr Telford, the Council informed him that there was no new information held by the Council (i.e. information not already provided to Mr Telford). As the matter had been dealt with and the Council had nothing further to disclose, the Council considered parts 1 and 5 of his information request to be manifestly unreasonable.
28. In its submissions to the Commissioner, the Council explained that it had been corresponding with Mr Telford about Policy RES3 and the cost plan since around 2004/05, when Policy RES3 was first approved.
29. The Council submitted that Mr Telford had already been provided with all of the information it held on this matter, including information concerning the cost plan: there was no new information to disclose. The Council stated it was aware of the information Mr Telford required, having carried out "many many searches regarding this". It was quite clear that there was no new cost plan.
30. The Council informed the Commissioner that Mr Telford was currently subject to its Unacceptable Contact Policy (UCP) in respect of Policy RES3.
31. The Council referred to two previous applications submitted to the Commissioner by Mr Telford concerning Policy RES3, both of which resulted in decision notices (one concerning the cost plan² and the other concerning the Section 75 Agreement³). It noted that part 1 of Mr Telford's request concerned both of these matters.
32. With regard to Mr Telford's request for information that described the logic behind the cost plan, the Council took the view that this was not information which it held.
33. Acknowledging its obligation to interpret exceptions in a restrictive manner, and to apply a presumption in favour of disclosure, the Council argued that it had disclosed all information to Mr Telford and there was nothing further to disclose. The Council believed that Mr Telford was not looking for information, but rather wished to enter into dialogue with Council officers on a subject about which he was not entitled to correspond, using the EIRs as a means of circumventing its UCP. The Council believed it would therefore be unreasonable to consider corresponding with Mr Telford in terms of this particular request.
34. The Council explained that the developer will be required to submit a cost plan; however, one had not yet been submitted as the development was not fully underway. The Council stated that, should any further information become available, it would be disclosed to Mr Telford.

² <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2015/201501478.aspx>

³ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201600207.aspx>

35. The Council was asked to provide documentary evidence to support its reliance on regulation 10(4)(b). The Council took the view that it had submitted this evidence both in terms of previous requests and the fact that Mr Telford had seen the Council's full files.
36. The Council took the view that dealing with this request would be a substantial and arduous burden. It submitted that it had "gone through this process already" following which the Commissioner had issued a decision notice.
37. In this case, the Council believed the question to be considered was whether it was reasonable for the Council to continue to answer repeated queries from Mr Telford for information which it had already confirmed was not available.
38. The Council submitted that, in view of the amount of information already provided to Mr Telford and all of the previous correspondence with him, it would be manifestly unreasonable for the Council to enter into further correspondence with Mr Telford on this matter: there was no further information to disclose, and it placed undue pressure on the Council. In these circumstances, the Council argued that the burden of responding would be enough to justify the decision to deem a request "manifestly unreasonable".

Mr Telford's submissions

39. In his submissions to the Commissioner, Mr Telford submitted that the Council's Local Development Plan described Policy RES3 as being of significant community benefit. Mr Telford argued that it was therefore in the public interest that the complex and contractual aspects of Policy RES3 could be fully understood by the community.
40. Mr Telford stated that the maximum profit permitted to the developer under the strict criteria of Policy RES3 has now been significantly exceeded under the terms of a Section 75 Agreement between the Council and the developer, the effect of which would be to reduce the finances available for the community benefit aspect of Policy RES3.

The Commissioner's view

41. The Commissioner has fully considered all of the submissions made by both the Council and Mr Telford.
42. Parts 1 and 5 of Mr Telford's request do not appear, on the face of it, to be manifestly unreasonable. The information he is seeking concerns a matter of some significance to the local community, and it seems reasonable to ask why a key document in the Section 75 Agreement has been left blank. However, the Commissioner is conscious that the manifestly unreasonable nature of a request might only emerge after considering the request within, for example, the context of previous or ongoing correspondence between the applicant and the authority.
43. A request will impose a "significant burden" on a public authority where responding to it would require a disproportionate amount of time and the diversion of an unreasonable proportion of its resources (including financial and human) away from other statutory functions. Public authorities should also consider the scale and impact of the request on its resources as a whole, rather than simply that part of the organisation most immediately affected.
44. The Commissioner has carefully considered the submissions made by the Council which were intended to show that parts 1 and 5 of Mr Telford's request were part of a series of correspondence on a particular aspect of Policy RES3, and that this correspondence imposed a significant burden on the Council. She acknowledges that the Council intended to demonstrate the burdensome effect of the request within the context (and as a continuation) of

previous correspondence between Mr Telford and the Council, and with regard to the fact that all information held by the Council on the matter had already been disclosed to Mr Telford.

45. However, the Commissioner considers that the Council's submissions failed to demonstrate this burdensome effect. Despite being asked to provide documentary evidence to support its reliance on regulation 10(4)(b) (which may well have shown the extent of historical correspondence with Mr Telford), the Council failed to do so. Instead, it considered that the Commissioner's request for evidence had been satisfied by the submissions it had made in respect of Mr Telford's previous applications and by taking account of the fact that Mr Telford had seen the Council's full files on the matter.
46. As each case has to be considered on its own merits, public authorities must provide the Commissioner with the necessary evidence to support their position *in respect of that specific case*. It is not for the Commissioner, or her staff, to locate such evidence that may be held in historical case files. The obligation to provide the necessary evidence lies with the public authority itself. Effectively, the Commissioner can only consider the evidence submitted to her. On this occasion, the Council has failed to provide any evidence.
47. The Commissioner has also considered the Council's argument that it would be unreasonable to correspond with Mr Telford on the subject of Policy RES3, given that he was subject to its UCP in this respect. She notes that Mr Telford's request for information was in six parts, and that all six parts sought information concerning Policy RES3. It is a matter of fact that the Council provided a response to Mr Telford for the remaining parts of his request (i.e. those parts not under consideration here) otherwise than in terms of regulation 10(4)(b).
48. The Commissioner must therefore question why the Council chose to correspond with Mr Telford by replying to some parts of his information request, given that he was subject to the Council's UCP in respect of Policy RES3, while arguing that it would be unreasonable to correspond on the two parts of the request under consideration here. The Council's arguments relating to this point appear to be contradictory.
49. The Commissioner notes that condition 2 of Policy RES3 for Kelburn Castle, Fairlie requires the submission of a detailed, fully verifiable, financial and business plan for the overall development. Noting that the published cost plan (referred to in part 1 of Mr Telford's request) shows no costings, the Commissioner considers parts 1 and 5 of Mr Telford's request to be reasonable requests. The Commissioner accepts that projects such as Policy RES3 are constantly evolving. While it may well be the case that the Council has no new information that could be provided, public authorities have a duty under the EIRs to advise and assist applicants in understanding any responses provided to them.

The Commissioner's conclusions

50. In the circumstances, the Commissioner is not satisfied, on the basis of the submissions put forward by the Council, that it has demonstrated that parts 1 and 5 of Mr Telford's request were manifestly unreasonable.
51. Given that Mr Telford is currently subject to the Council's UCP in relation to Policy RES3, there is no doubt that the strained relationship between the parties is a significant factor here. However, the Council has not provided sufficient evidence to demonstrate that responding to parts 1 and 5 of Mr Telford's request imposed the significant burden it claimed. It should also be remembered, that managing communication under a UCP does not remove Mr Telford's right to information under FOISA and the EIRs, nor does it remove or diminish the Council's duty to respond.

52. The Commissioner is therefore unable to accept that parts 1 and 5 of Mr Telford's request presented the kind of significant burden claimed by the Council for the purposes of regulation 10(4)(b). She does not uphold the Council's reliance upon this exception, in relation to parts 1 and 5 of Mr Telford's request.
53. Having reached this finding, the Commissioner is not required to consider the public interest test in regulation 10(1)(b) of the EIRs.
54. The Commissioner requires the Council to respond to parts 1 and 5 of Mr Telford's request in accordance with the requirements of the EIRs, otherwise than in terms of regulation 10(4)(b). In other words, the Commissioner requires the Council to carry out a fresh review of its response to parts 1 and 5 of Mr Telford's request, in accordance with regulation 16 of the EIRs.

Decision

The Commissioner finds that North Ayrshire Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to parts 1 and 5 of the information request made by Mr Telford.

She finds that the Council was not entitled to refuse to comply with parts 1 and 5 of the request under regulation 10(4)(b) of the EIRs.

The Commissioner therefore requires the Council to respond to parts 1 and 5 of Mr Telford's requirement for review in accordance with the requirements of the EIRs (otherwise than in terms of regulation 10(4)(b) of the EIRs) by **20 February 2017**.

Appeal

Should either Mr Telford or North Ayrshire 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.

Enforcement

If North Ayrshire Council (the Council) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner

5 January 2017

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.

...

14 Vexatious or repeated requests

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the request is vexatious.
- (2) Where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.

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;

...

(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;

...

(e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and

...

5 Duty to make available environmental information on request

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

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...

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

...

(b) the request for information is manifestly unreasonable;

...

Appendix 2: Mr Telford's request of 6 July 2016

Freedom of Information Request

All of the information requested is in respect of Policy RES3 of the current North Ayrshire Council Local Development Plan.

1. It is noted that the cost plan contained within the Section 75 Agreement registered with the Registers of Scotland is simply a blank template. Please provide details of the actual completed cost plan that is relied on by the parties to this agreement. If such detail is still currently not available, please provide the information that describes the logic behind such an omission and when full cost plan details will be available. It is noted that cost plan details were originally available and published on NAC's Planning website. Please advise if this original cost plan has been superseded or is still a live document
2. It is noted that Mr Ian Turner Mackay is still listed as a trustee within the Section 75 Agreement. As Mr Mackay is no longer an employee of North Ayrshire Council, please provide details of who is to replace him. Please also provide information that details any remuneration that Mr Mackay may be currently receiving in his position as a trustee.
3. On a similar vein to Item 2 above, it is noted that Policy RES3 describes this Policy as being of substantial community benefit. That being the case, please provide information on why Fairlie Community Council's formal request that it should be represented on the Board of Trustees has been consistently blocked and refused by North Ayrshire Council.
4. It is noted that all of the documentation pertaining to the original planning application and consent has now been removed from North Ayrshire Council's Planning website. Please provide the full information pertaining to this rescinded planning documentation.
5. Please provide full details of any or all of the various cost reports listed and required by the Section 75 Agreement that may have currently been prepared and presented to either the RES3 Trust or to North Ayrshire Council.
6. Please provide full details, including contact details, of the professional quantity surveyor who may have been appointed under the terms of the Section 75 Agreement.

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